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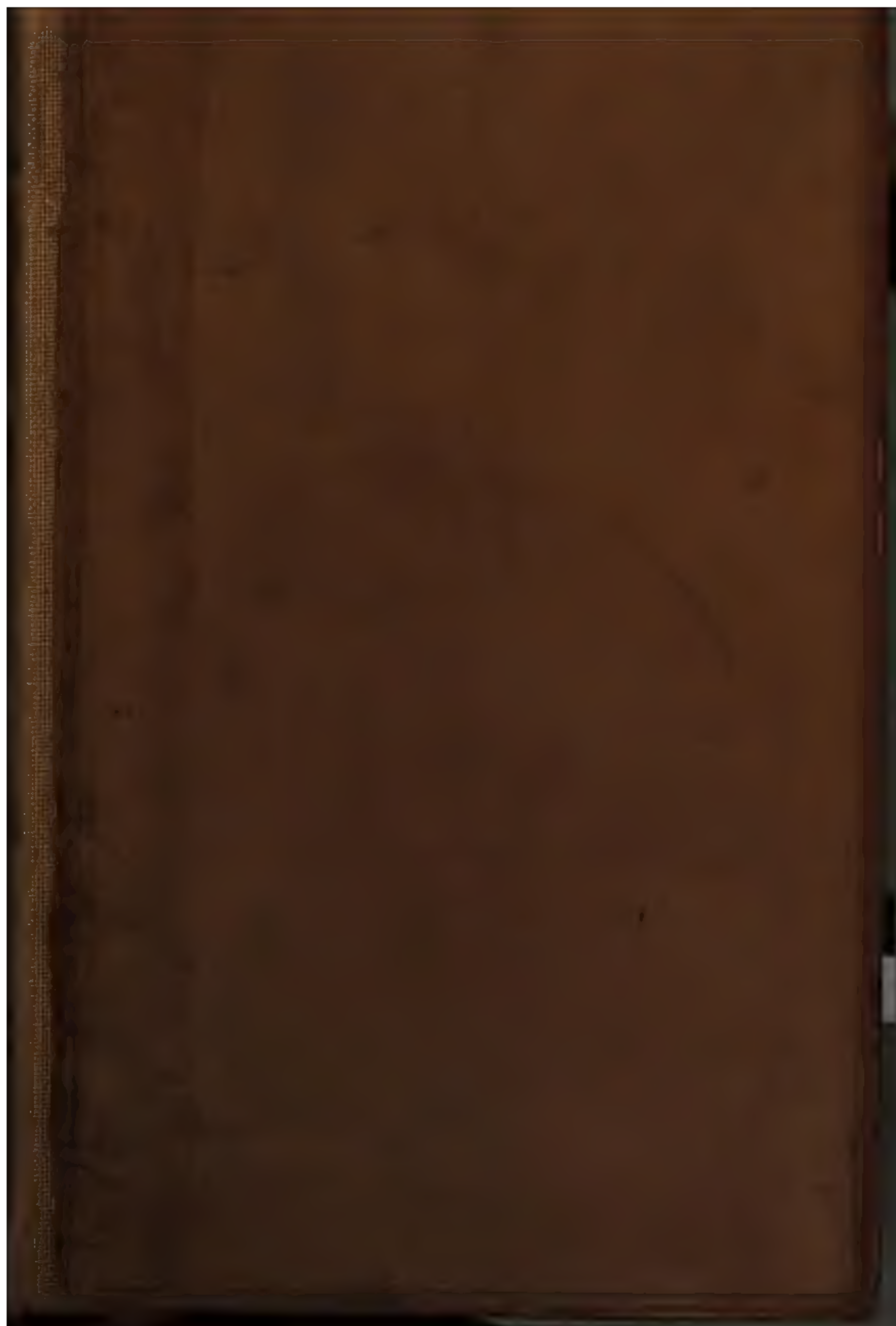
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REPORTS OF CASES

RELATING TO THE

Duty and Office of Magistrates

DETERMINED IN THE

COURT OF KING'S BENCH,

FROM

TRINITY TERM, 1823, TO HILARY TERM, 1825.

BY

JAMES DOWLING, Esq. OF THE MIDDLE TEMPLE,

AND

ARCHER RYLAND, Esq. OF GRAY'S INN,

BARRISTERS AT LAW.

VOL. II.

LONDON :

SWEET, 3, CHANCERY LANE; R. PHENEY, INNER TEMPLE LANE;

A. MAXWELL, 21, AND STEVENS AND SONS, 39, BELL YARD;

~~Law Booksellers and Publishers.~~

AND R. WRIGHTSON, BIRMINGHAM.

1825.



London: Printed by C. Roworth,
Bell-yard, Temple-bar.

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C A S E S
IN THE
COURT OF KING'S BENCH,
FOR THE USE OF
Justices of the Peace.

TRINITY TERM, 1823.

Ex parte CÆsar HAWKINS.

1823.

*Wednesday,
June 4.*

PLATT, last Term, obtained a rule to shew cause why a writ of habeas corpus should not issue to the commander of his Majesty's ship *Severn*, commanding him to bring up the body of *Cæsar Hawkins*, who had been convicted under 24 Geo. 3. c. 47. s. 1, and sent, by virtue of 3 Geo. 4. c. 110, on board that ship, to serve in his Majesty's naval service. That part of the conviction on which the objections after-mentioned arose, was in the form following:—

“ BE it remembered, that on, &c., *C. H.* hath been duly convicted before me, *A. P. Esq. &c.* of having been found and taken on board a certain vessel, to wit, a smack, subject and liable to forfeiture, under the provisions of a certain Act of Parliament made and passed in the 24 Geo. 3. for that the said vessel was, on, &c. found hovering within the limits of a port of this kingdom, to wit, the port of *Rye*, in the said county of *Sussex*, and then and there having on board, &c.”

A conviction on 24 Geo. 3. c. 47. s. 1. which subjects vessels having foreign spirits on board, to forfeiture, when found hovering, &c. within the limits of a port of this kingdom, must shew on the face of it, that the party convicted is a *British* subject, and that the vessel was not proceeding on her voyage, wind and weather permitting, &c.

1823.

Ex parte
HAWKINS.

By 45 Geo. 3. c. 121. s. 7, every person, *being a subject of his Majesty*, who shall be found on board a vessel liable to forfeiture, under any of the provisions of that or any other act, for being found at anchor, &c., may be taken before a Justice, and dealt with in the manner therein directed; and by 24 Geo. 3. c. 47. s. 1, it is enacted, that if any vessel shall be found at anchor, or hovering within the limits of any of the ports of the kingdom, or within four leagues of the coast thereof, and shall be discovered to have been within the said limits or distance (not proceeding on her voyage, wind and weather permitting, unless in case of unavoidable necessity and distress of weather, of which necessity and distress the master or other person having the command of such vessel shall give notice and make proof before the collector of the customs of any port within the limits of which the vessel shall be found, immediately after her arrival), having on board any brandy, &c., shall be liable to forfeiture. It was objected, that the conviction was bad, first, because it did not shew that the defendant was a subject of his Majesty, and liable to punishment for being in a vessel found hovering; and second, because the mere act of hovering was no offence, unless the conviction went on to shew that the vessel was not proceeding on her voyage, wind and weather permitting, &c.

Jervis now shewed cause, and contended, first, that as the 24 Geo. 3. c. 47. s. 1, was general in its terms, and did not mention subjects of his Majesty, the conviction need not necessarily shew that the party convicted was *British* subject. If the defendant here was not a *British* subject, that was matter of defence before the Justice to which he was at liberty to prove; but the conviction need not shew the fact affirmatively. Then second, the statute comprehended three distinct offences, first, being found

at anchor; second, being found hovering; and third, being discovered to have been within certain limits. The words "not proceeding on her voyage, &c.," were in a parenthesis, and evidently applied to the last-mentioned offence; and consequently need not to have been noticed in this conviction.

1823.

Ex parte
HAWKINS.

Platt, contra, was stopped by the Court.

ABBOTT, C. J.—I am of opinion that the offence is not sufficiently described. All that appears is, that the vessel was hovering within certain limits. A vessel may be hovering within the limits of a port, and may not be proceeding on her voyage, and yet may not be liable to forfeiture. She may be prevented by stress of weather from proceeding on her voyage, and absolute necessity may compel her to hover. It is much too narrow a construction of the statute to say, that the mere act of hovering is sufficient to sustain the conviction, unless the circumstances mentioned in the parenthesis are negatived. This objection, therefore, is well founded. As to the other, I am strongly inclined to think, that the jurisdiction of the Magistrate is insufficiently described, inasmuch as the conviction does not state that this party is a *British* subject, for if he be not, he is not guilty of any offence, in consequence of this vessel being found in the situation described. It is very easy to fill up these convictions, by stating that the party is a *British* subject, and to add, that when found hovering, the vessel was not proceeding on her voyage, wind and weather permitting.

HOLROYD(a), and BEST, Js., concurred.

Rule absolute.

(a) *Bayley*, J., was absent.

1823.

Tuesday,
June 17.The KING v. The MAYOR of LIVERPOOL, in the
Matter of PRICE.

The 50 Geo. 3. c. 73, reciting 31 Geo. 2. c. 29. 3 Geo. 3. c. 6. and 13 Geo. 3. c. 62, makes certain amendments in the laws then in force respecting the trade of bakers, &c. and by s. 5, all powers given by the previous statutes upon the same subject are incorporated, except those altered by that statute. The 31 Geo. 2. c. 29. ss. 36 & 37, respectively, take away the writ of *certiorari*, and give an appeal to the Sessions:—
Held, that 50 Geo. 3. c. 73. s. 5, incorporates those sections, and that on a conviction under the latter statute, the *certiorari* is taken away, and an appeal given.

PATTESON moved for a *certiorari* to remove a conviction under the Bread Act, 50 Geo. 3. c. 73, into this Court. The object of the motion was to determine whether s. 5. of that statute virtually incorporated ss. 36 & 37 of 31 Geo. 2. c. 29, by the first of which, the *certiorari* was expressly taken away, and by the second an appeal was given to the Sessions. He contended, that although s. 5. of 50 Geo. 3. c. 73, was a general clause of reference to 31 Geo. 2. c. 29. 3 Geo. 3. c. 6. and 13 Geo. 3. c. 62, yet it might be satisfied by incorporating the general, without including the special provisions of those statutes, one of which took away the *certiorari*, and the other gave an appeal. If this were so, then, as the 50 Geo. 3. c. 73, did not take away the *certiorari*, it followed, from the general rule of construction in cases of this nature, that the party convicted was entitled to the writ. He cited *Rex v. Sheppard* (a), *Rex v. The Justices of Surrey* (b), *Rex v. Dove* (c), and *Kaye's case* (d).

Hollingshed shewed cause in the first instance, and contended, first, that the *certiorari* was, by necessary interpretation, taken away by 50 Geo. 3. c. 73. s. 5; and, second, that if not taken away, the defendant was entitled to appeal, under 31 Geo. 2. c. 29. s. 37, and therefore the motion for a *certiorari* came too early. He cited *Rex v. Sparrow* (e), and *Rex v. Eaton* (f).

(a) 3 B. & A. 414.

(b) 2 T. R. 510.

(c) 3 B. & A. 596.

(d) 1 Dowl. & Ry. 436.

(e) 2 T. R. 198.

(f) Id. 89.

The COURT took time to consider of the case, and judgment was now delivered by

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ABBOTT, C. J.—This was a motion for a *certiorari* to remove a conviction under 50 Geo. 3. c. 73. It was contended that the writ of *certiorari* is in effect taken away by that statute, and that an appeal is given to the Sessions. We are all of opinion, that the writ of *certiorari* is taken away, and that an appeal lies to the Sessions. The act in question is entitled “An Act to alter, explain, and amend the Laws now in force respecting the Trade of Bakers, residing out of the City of *London*, or the Liberties thereof, or beyond Ten Miles of the *Royal Exchange*.” The title, therefore, shews that the object of the statute was to alter, explain, and amend the laws then in force. It begins by reciting the title of an act of 31 Geo. 2. c. 29; another of 3 Geo. 3. c. 6.; and another of 13 Geo. 3. c. 62; and then it proceeds, “And whereas some of the regulations and provisions contained in the said several acts, have been found defective, and in some respects injurious to the bakers and the public; and it is therefore expedient that the same should be altered and amended, and more effectual provisions made for ascertaining the due weight of bread, and for the better observance of the Lord’s day, commonly called *Sunday*.” The former acts, therefore, are not in terms repealed, except so far as they are hereby altered. The first section imposes a penalty on bakers for selling bread short of weight; the second requires that bakers shall keep weights and scales; the third contains a provision against baking on *Sunday*; the fourth contains an exception in favor of the rights and liberties of the Universities; and then comes the fifth section, upon which arises the question, whether this or any of the other acts is to be construed so as to take away the *certiorari*. The lan-

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guage of it is this:—"That all powers, authorities, provisions, directions, penalties, forfeitures, clauses, matters, and things contained in the several acts now in force, not altered or varied by any of the provisions of this act, as far as the same can be made applicable, and can be applied for the carrying into execution the purposes of this act, shall be used, exercised, and put in execution, for enforcing the regulations, provisions, and directions of this act, in such and the same manner as if the same were herein contained, and were at large re-enacted and made part of this act; and the penalties by this act inflicted shall be recovered and applied in like manner as the penalties by the said several other acts inflicted, are directed to be recovered and applied." The question therefore turns upon the effect of this fifth section, founded as it is on other acts, which it notices as bearing on the same subject. Now a general, and, I must say, an important question is raised upon this motion. It is perfectly clear, that according to the general rules and principles of law, a *certiorari* issues from this Court, unless some Act of Parliament has taken it away in express terms. So on the other hand an appeal to the Sessions against the conviction of Magistrates, does not lie unless the Act of Parliament gives it. These two general principles are now clearly established. The question therefore turns entirely upon the construction of this section. The clause itself is not altogether free from ambiguity. Construing the statute as a repeal of the recited Acts of Parliament as to those purposes for which it was passed, we see that it makes alterations in some clauses of the previous acts, and amends others, but it does not make any alteration as to what had been previously established by 31 Geo. 2. c. 29. ss. 36 & 37, which give the appeal, and take away the *certiorari*. We are therefore of opinion, and feel ourselves called upon to say, upon the whole, that although some

obscurity exists in this particular section by the introduction of too many words, yet that it was the intention of the Legislature to leave the provisions of the former acts, as they regard the appeal and *certiorari*, in full force; and consequently that the appeal still lies, and the *certiorari* is taken away. We are of opinion, therefore, that the party applying must take nothing by his motion.

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The MAYOR
of
LIVERPOOL.

Rule refused.

The KING v. The JUSTICES of WORCESTERSHIRE.

Wednesday,
June 18.

ON shewing cause against a rule nisi, for a mandamus to the Justices of *Worcestershire*, commanding them to proceed to hear and determine the complaint of *T. Forester*, D. D., against the late churchwardens and overseers of the poor of the parish of *St. John in Benwardine*, in the county of *Worcester*, for not signing, passing, and delivering to the succeeding overseers and churchwardens, an account in writing of their receipts and payments of money in the year during which they were in office, conformably to the provisions of 17 Geo. 2. c. 38, the case was this:—The late overseers of the parish had been summoned before the Justices for not having signed and passed their accounts, in pursuance of the statute, when it appeared, that one of the overseers had, on the 1st *April* last, delivered into and verified before a Justice of the Peace, a piece of loose paper, purporting to be an account of the receipts and disbursements for the year 1822, containing merely the gross sums of money levied and disbursed during the year, without any other document or voucher. The Justices were of opinion, that although the account thus certified, was not

Where ex-overseers of the poor, delivered to succeeding overseers, a certificated balance sheet of the gross sums received and disbursed during the year in which they were in office, without any other voucher or document: Held, that this was not a sufficient compliance with 17 Geo. 2. c. 38, and mandamus issued to the Justices to hear and determine a complaint for not properly accounting pursuant to the statute.

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 The KING
 v.
 The JUSTICES
 of
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 SHIRE.

such as was required by the statute, yet inasmuch as some sort of account had been rendered by the overseer, they had no authority to proceed in the complaint, and compel the delivery of a more full and proper account, and therefore dismissed the summons. The affidavits, on the part of the overseers, stated, that the accounts had always been certified by the overseers of *St. John's*, in the way mentioned, and that the accounts had been regularly kept in books, which books were handed to the new sets of overseers when successively appointed. The question now was, whether the mere delivery in, and certifying a balance sheet of the receipts and disbursements, was a sufficient compliance with the statute, which requires, that the churchwardens and overseers of the poor, shall yearly and every year, within fourteen days after other overseers shall be nominated and appointed to succeed them, deliver into such succeeding overseer, a just, true, and perfect account in writing, fairly entered in a book or books kept for that purpose, and signed by the said churchwardens and overseers, of all sums of money by them received, or rated and assessed, and not received, &c. which account shall be verified by oath before one or more Justice, &c. and in case they refuse so to do, it shall be lawful for any two or more Justices of the Peace to commit him or them to the common gaol, until he or they shall have given such account.

Puller and *Campbell* shewed cause against the rule, and contended, that inasmuch as it had been determined by this Court in *Rex v. Carrocke(a)*, that if any account has been rendered before the Justices, although imperfect, the Justices could not take any steps to commit the overseers under the provisions of 43 *Eliz.* c. 2, a mandamus would not lie. In this case an account of the gross sums

(a) 1 Bott. P. L. 299. Show. 395.

received and expended had been rendered, which was sworn in the affidavits to have been always the usual and accustomed mode of rendering the overseers accounts, in the parish of *St. John*. It was also sworn, that the accounts were kept regularly, and passed from one set of overseers to another, and that the accounts were always accessible to the parishioners.

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 of  
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ABBOTT, C. J.—That certainly will not do. Delivering in a summary or balance sheet of the monies received and expended, is not such an account as the statute requires. The overseers must do a great deal more than they appear to have done in this case. They are to give to the succeeding overseers a just, true, and perfect account in writing, fairly entered in a book or books to be kept for that purpose, of all sums of money by them received, or rated and assessed, and not received. Now, a mere balance sheet will not shew what sums have been rated and assessed, and not received. The overseers clearly ought to verify and deliver over the sort of account required by the very terms of the statute. The usage stated in the affidavits cannot dispense with the provisions of the Act of Parliament.

The other Judges concurred.

Rule absolute.

*Russell* was to have argued on the other side.



1823.



Wednesday,  
June 18.

The KING v. The JUSTICES of the WEST RIDING  
of YORKSHIRE.

Where a clause in a Private Inclosure Act, gave an appeal to any person aggrieved by any thing done in pursuance of that act, "except as to such acts, determinations, or proceedings of the commissioners, as by the General Inclosure Act were directed to be final and conclusive;" and an order was made by a commissioner and a magistrate jointly, for stopping up a private road set out under the local act: Held, that an appeal lay to the Sessions against such order, there being nothing in the General Inclosure Act which rendered the decision of Justices final and conclusive

ON shewing cause against a rule nisi for a mandamus to the Justices of the West Riding of *Yorkshire*, commanding them to enter continuances, and hear the appeal of *T. R. Beaumont, Esq.* and *Diana* his wife, against an order under the hands of *M. Stocks, Esq.* and *W. Pilkington, Gentleman*, for stopping up a private road, set out under 4 Geo. 4, "An Act for inclosing Lands in the Manor of *Whitley*, in the Parish of *Kirk Eaton*, in the West Riding of the County of *York*;" the case was this:—In pursuance of a notice published in the newspapers, Mr. *Stocks*, a Magistrate of the county of *York*, and Mr. *Pilkington*, one of the commissioners named in the act above-mentioned, held a meeting for the purpose of hearing any objections which might be urged to any of the roads set out by the commissioners appointed by that act; and the commissioners having set out a certain private carriage and occupation road, in which Mr. and Mrs. *Beaumont* were interested, the matter was heard by the gentlemen above-mentioned, who determined that such road ought not to have been set out, and by their order disallowed the same. Against this order Mr. and Mrs. *Beaumont* appealed, but the Sessions dismissed the appeal, on the ground that they had no jurisdiction. The question now was, whether by the Private Inclosure Act, by reference to the General Inclosure Act, 44 Geo. 3. c. 109, (which it recited), the order in question was such an act, determination, or proceeding, against which an appeal would lie. By s. 44, of the Private Inclosure Act, it is enacted, "that if any person or persons shall think himself, herself, or themselves aggrieved by any thing done

or omitted to be done in pursuance of the said recited act, or of this act, *except as to such acts, determinations, or proceedings of the said commissioner*, as are by the said recited act, or this act, directed to be final, binding, or conclusive, and also except as to such claims, objections, matters, and things, as by this act are directed or authorised to be ascertained, settled, tried, or determined by the verdict of a Jury, he, she, or they may appeal to the General Quarter Sessions of the Peace for the West Riding of the county of *York*, within four calendar months next after the cause of complaint shall have arisen; and the said court of Quarter Sessions are hereby authorised to determine such appeal, and to award such costs as to them shall seem reasonable, which determination shall be final and conclusive, and shall not be removed or removable by *certiorari*, or any other writ or process whatever. By s. 8. of the General Inclosure Act, 41 Geo. 3. c. 109. the commissioners, before making any allotments, shall appoint public carriage roads, and prepare a map thereof to be deposited with their clerk, and give notice thereof, and appoint a meeting, at which, if any person shall object, "the commissioners, together with any Justice or Justices of the Peace of the division, shall, according to the best of their judgment upon the whole, order and finally direct how such carriage roads shall be set out." Then follows a proviso as to old and accustomed roads, "Provided always, that in case the commissioners shall be empowered to stop up any old or accustomed road passing, &c. the same shall in no case be done without the concurrence and order of two Justices, and which order shall be subject to an appeal to the Quarter Sessions in like manner, &c. as if the same had been originally made by such Justice as aforesaid." And by s. 10. of the same act, the commissioners are empowered to set out and appoint such private roads, &c. as they shall

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think requisite, giving such notice, and subject to such examination as to any private roads or paths as are required in the case of public roads, &c.

*Littledale* and *J. Blackburn* now shewed cause against the rule. The question turns upon the words of the Private Inclosure Act. By s. 44. an appeal is given to persons aggrieved by any thing done in pursuance of the act, except as to such acts, determinations, or proceedings of the commissioners as are by the General Inclosure Act directed to be final, binding, or conclusive. Now it is clear by s. 8, of the General Inclosure Act, which applies to setting out public roads, that the order of the commissioners, or Justice or Justices of the division, shall be final and conclusive; and sect. 10. which relates to the setting out of private roads, must be read in the same way, because it expressly subjects the proceedings of the commissioners to the like provisions as in the case of a public road, and consequently the order of the commissioners and Justices would in that case be final and conclusive. The case of *Rex v. The Dean Forest Inclosure Commissioners*(a), is a decisive authority for this construction. There is, however, a slight distinction in this case, but which makes no difference. The exception here is, "to such acts, determinations, or proceedings of the said commissioners, as are by the said recited act, or this act directed to be final, binding, or conclusive." Now the order in this instance is not an act, determination, or proceeding of the commissioners, but of a commissioner and a magistrate conjoined. It may be true that it is an act of a commissioner, but it is not an act of a commissioner alone; it is an act of a commissioner and another person and *à fortiori* it comes within the operation of the 8th

(a) 2 M. & S. 80.

and 10th sections of the General Inclosure Act; which makes the decision of the commissioners and justices conjoined, final and conclusive with respect to both public and private roads. The case of *Rex v. The Justices of Cumberland* (a), is perfectly distinguishable from this, because there the matter at issue did not fall within the excepted determinations which were declared by the General Inclosure Act to be final and conclusive. On these grounds, the Sessions did right in refusing to hear the appeal.

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Scarlett, contra. This is an appeal from a decision, not of the commissioners, but of a commissioner and a magistrate, for stopping up a *private* road, and therefore the case does not come within the 8th section of the General Inclosure Act, which applies exclusively to public roads. It may be true, that the joint order of the commissioners and justices is by that section declared to be final and conclusive; but *non constat* that the 10th section, which relates to private roads, takes away the appeal. That section only declares, that the setting out of a private road shall be subject to such notice and examination as are required in the case of a public road; but there is no declaration that the order of the commissioners in such cases shall be final and conclusive, and therefore the Court cannot by mere inference say, that because the appeal is taken away in the case of a public, it is also taken away in the case of a private road. Express words are necessary to take away the right of appeal; and as there is no declaration that the judgment of the commissioners shall be final and conclusive as to a private road, it seems reasonable that in this case an appeal ought to lie. Had this been a determination of the commissioners alone, perhaps there might be some weight in the argument on

(a) 1 B. & C. 64.

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the other side, but it is an order of a commissioner and a justice. The exception in the 40th section of the private act, relates to the determination of *commissioners* only, and has no reference to the order of commissioners *and magistrates*; and there being no clause in the Public Inclosure Act which makes the determination of *the justices* final and conclusive, it is obvious that the appeal is not taken away in this case.

ABBOTT, C. J.—I own I am of that opinion. The 40th section in the Private Inclosure Act declares, “that if any person shall think himself aggrieved by any thing done or omitted to be done in pursuance of the General Inclosure Act, or of this act, *except* as to such acts, determinations, or proceedings of *the said commissioners* as are by the said recited act or this act directed to be final, binding, or conclusive, &c. he may appeal, &c.” Now, the exceptive part of this clause does not mention *Justices*, but refers exclusively to such acts, determinations, and proceedings of *the commissioners* as by the recited act are declared to be final and conclusive. I cannot say, therefore, that this order, which is not made by a commissioner alone, but by a commissioner and a justice conjointly, comes within the exception. There is nothing in the General Inclosure Act which makes the determination of the Justices final and conclusive. On the contrary, at the conclusion of the 8th section, which relates to the stopping up of old roads, it is expressly provided that the decision of two Justices, in concurrence with the commissioners, for stopping up an old or accustomed road, shall be subject to an appeal to the Sessions. I therefore think this rule must be made absolute.

The other Judges concurred.

Rule absolute.

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## The KING v. The INHABITANTS of BYKER.

N appeal against an order of two Justices, for the removal of *William Gray* and *Mary* his wife, from *ughton-le-Spring*, in the county of *Durham*, to *Byker*, *Northumberland*, the Sessions confirmed the order, subject to the opinion of this Court, upon the following:—

By indenture, dated 23d October, 1809, between *Jes Potts*, of *Byker*, of the one part, and several persons whose names or marks are thereto subscribed (of whom the pauper, *William Gray*, was one), of the other part, the said *J. P.* hired and retained the several other persons thereto, and they hired and bound themselves as workmen or servants, to be employed in a certain colliery, for the term of one whole year, from the 21st January, 1810, upon the following terms and conditions:—That the said *J. P.* should pay to every one of the said persons, for every good and sufficient day's work, not exceeding fourteen hours, in single shaft pits, 1s. 10d. per day, and 2d. per day extra, when that time was exceeded. That the said several persons hired and retained by the said *J. P.*, covenanted with *J. P.*, that each of them should, in their several stations, diligently perform and obey his orders and directions as to the manner of working the colliery, and work the colliery fairly and regularly, as therein expressed; or in default thereof, should forfeit and lose (to be retained out of their wages) the sum of 6d. for every act of disobedience; and also the sum of 2s. 6d. per day for lying idle, upon each hewer, de-

Where the owner of a colliery, by indenture hired certain workmen to be employed in the colliery for one whole year, at the wages of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a-day additional when that time was exceeded; and they were to forfeit 10s. 6d. for every act of disobedience, and 2s. 6d. a-day for lying idle (to be deducted out of their wages,) with a proviso, that the jurisdiction of the Justices should not be ousted in case of disputes; and a covenant that if at Christmas the master should have occasion to repair the machinery belonging to the colliery, he might stop the works at the farthest for a week, without

paying any wages to the workmen, unless otherwise employed:—Held, that this was a conditional, and not an exceptive contract, and that a workman who had served for it for one whole year, thereby gained a settlement.



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puty crane-man, on-setter, sinker, drawer, or off-hand man, to be deducted as aforesaid; and for every working day which they, or any of them, so hired and bound as aforesaid, should absent themselves from their employment, or should neglect or refuse to fulfil and execute the whole of the business of an usual day's work, unless prevented by sickness or some other unavoidable cause, the defaulters should forfeit and lose (to be retained as aforesaid) the sum of 2s. 6d. for every such default, refusal, or neglect; all which said forfeitures and penalties should be deducted and retained out of the wages or earnings of each offender, at the first pay-day next after the offence should be committed. The indenture contained a proviso, that the indenture should not, nor should any covenant or clause therein contained, be construed to extend to oust or exclude any Justice of the Peace from any jurisdiction or cognizance which the statute law of this kingdom hath given to such Justices over masters and servants; but, on the contrary, that each of the several parties thereto should be at full liberty, notwithstanding any thing therein contained, upon any breach of any of the before-mentioned covenants, to call for and require the aid and assistance of any Justice or Justices, to compel the performance, or punish any breach of such covenants, as far as by law they could or might, if the indenture had not been made. It was covenanted and agreed, that in case the said J. P. should think it necessary, at or about *Christmas*, 1822, to repair, alter, amend any engines or machines of or belonging to the said colliery, or to remove or prevent any obstructions hindrance which might have happened to the same, or do any other thing which he, his executors, &c. should think needful to be done in the said colliery, or the working of the same, that then it should be lawful for him to stop the workings, at all or any of the pits of the colliery, for any length of time, not exceeding in the whole

the space of seven days, without paying or allowing any wages or sums of money to any of the several parties who should thereby be prevented from doing their daily work, save and except such of them as should be employed by him in any other work in and about the colliery, or otherwise, who should be paid or allowed reasonable wages for each his or their other work. Under this indenture, the pauper was retained and hired by Mr. Potts, as a driver, and served under it for an entire year, during the whole of which time he resided at *Byker*. At the time of the hiring, the pauper was under age, unmarried, and without any child. There was no evidence that he had, or had not, incurred any penalty or forfeiture during his year's service, or that any deduction had, or had not, been made from his wages. The question for the opinion of the Court is, whether the pauper gained a settlement in *Byker*, by his residence there, and his service under the indenture.

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*E. Alderson*, in support of the order of Sessions, contended, on a former day, that the contract in this case was a conditional, and not an exceptive hiring, and therefore that by a year's service under it, a settlement was acquired. He distinguished this case from *Rex v. Edgmond (a)*, *Rex v. Gateshead, Easter, 1821*, not reported (*b*), both of which

(a) 3 Barn. & Ald. 107.

(b) The following, however, is a note of the case from the Eds. 1821.

THE KING v. THE INHABITANTS OF GATESHEAD.

Easter Term,  
1821.


TWO Justices removed *Isaac Ward*, from ——— to *Gateshead*. The Sessions, on appeal, confirmed the order, and stated the following case for the opinion of this Court:—

By a memorandum of agreement, bearing date 5th April, 1813, made between J. D. of the one part, and several persons therein

The owner of a colliery, by agreement, hired his workmen for a whole year, but they were not to be required to

work during ten days in the *Christmas* holidays; during the working days they were to receive 6s. 6d. per day wages, and if they neglected to work on any one day, they were each to forfeit a penalty of 1s.; they were not required to work the whole day, but to do such quantity of work as was equal to a full day's work, and as soon as that was accomplished, they were to be at liberty to go where they pleased; and though there was a reservation of the jurisdiction of the Justices in case of any disputes:—Held, that this was an exceptive contract, and that a workman who had served under it for one whole year did not thereby gain a settlement.

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he insisted were cases of exceptive contracts, as the very terms of them expressly imported. Here there was no

named (of whom the pauper was one), of the other part, it was stipulated and agreed that the said persons should work in a certain colliery therein mentioned for one year, ending 5th April, 1814, on the terms and conditions, and subject to the penalties and forfeitures after mentioned. First, that the labourers should work for the whole year, except during ten days in the Christmas holidays, when they were not to work, nor to be liable to any penalties for not working. Second, that during the working days in the year, they were to receive each 2s. 6d. *per diem*, and in default of doing any work in any one of those days, they were to forfeit and pay 1s. each, as a penalty for their negligence; and third, they were not required to work the whole day, but to do such quantity of work as was equal to a full day's work, and as soon as that was accomplished, they were to be at liberty to go where they pleased. Under this agreement the pauper served a year, and the question was, whether by such service he gained a settlement in the parish in which the colliery was situated.

*J. Williams*, for the defendants, contended, that the exceptions, reservations, and penalties in the contract, vitiated the settlement; and he cited *Rex v. Edgmond*, as precisely in point.

*Tindal*, contra, contended, that the last clause of the agreement which provided, "that nothing herein contained shall alter, bind, or affect the legal remedies which usually belong to masters and servants, or in any respect have relation to the jurisdiction of Magistrates in cases of disputes between them," must be taken in connexion with the previous agreement, to work absolutely for a whole year, and if so, the pauper would have gained a settlement by serving under it.

ABBOTT, C. J.—I am of opinion that the pauper did not gain a settlement under this agreement. It is an exceptive contract, which completely negatives the idea of a yearly hiring and service. The last clause of the agreement cannot control its previous stipulations, and indeed there is no connexion between the last and the preceding clauses. The mode of punishment for any breach of contract is stipulated for between the parties themselves, and supersedes the control which the Magistrates in other cases would have over hired servants. Under this agreement, the Magistrates could not punish the pauper for leaving the service, which event is contemplated by the parties, who agree, that for any default, the servant shall pay certain fines or penalties for neglecting his work. I think this case cannot be distinguished from *Rex v. Edgmond*. There, the pauper,

express exception. There is no limitation as to any number of hours during which the pauper should work each day. To construe this an exceptive contract, the exception must appear on the face of the instrument itself. If by the custom of trade, or the ordinary manner in which servants are employed, the servant is required only to work certain hours in the day, that would not constitute an exception(b). In almost every contract there must be some exceptions implied; as, for instance, suppose a clerk employed in a merchant's counting-house

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in consideration of weekly wages, agreed to serve a bricklayer for three years, but in case he should neglect his master's business, or lose any time on his own account in any one week during the first year, then, that his master should deduct, from his weekly wages, in proportion to any over-work which the pauper might do in any one week. There were similar stipulations for the second and third years of the term; and it was also agreed, that in case they could not work through severity of weather, in any one year in the winter time, then, that the master should pay no wages during that time, but should permit the pauper to employ himself in any other business. The Court held, that these were express exceptions in the contract, and that the pauper did not gain a settlement by serving for a year under it. That case is directly in point with the present. It is manifest, that here the pauper is not to be under the control of the master for the whole of every day.

BAYLEY, J.—The pauper in this case, for any thing that appears, might have worked for any other master during the year; for if by extraordinary strength and skill, he did a quantity of work, which should be equal to a day's work, he was at liberty afterwards to do what he pleased. In addition to *Rex v. Edmond*, *Rex v. North Wilby* is also in point, where the stipulation was, that the pauper should work twelve hours each day for five years, as a weekly servant, and that was held to be an exception which destroyed the settlement.

BURR, J. (a).—The stipulation in this case is to do a certain quantity of work during each day, and as soon as the work is performed, the control of the master ceases.

Order of Sessions confirmed.

(a) *Holroyd, J.*, was absent.

(b) Vide Burr. S. C. 671. 1 Dougl. 383. 1 Barn. & Aid. 322.

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at a yearly salary, the hours of rest would not render it an exceptive contract. In the present case, it was quite obvious, that the stipulation as to the number of hours during which the pauper was to work, was merely introduced as a mode of calculating the wages. The hiring was general, but the mode in which the wages were to be paid, and the work performed, was special. The stipulations introduced could not control the original unqualified hiring for a year. It was clear that the pauper could not have left his master's service, and the special provision saving the ordinary jurisdiction of the Justices, was quite decisive to negative this as an exceptive hiring.

*Tindal*, contra, contended, that this was an exceptive contract, plainly manifested by the stipulation as to the quantity of labour which was to constitute a day's work. Suppose the pauper, as soon as he had performed fourteen hours labour, refused to do any more, could he be compelled, by the interposition of a Magistrate, to work any longer? If not, then there was an exception in the contract which destroyed the notion of a conditional hiring, and no settlement could be gained. The principle on which *Rex v. Edgmond* was decided, must govern this case. An original hiring for a year, will not over-ride the subsequent exceptions. In *Rex v. Edgmond* there never was an original hiring for a year, and yet the stipulation in that case for absence from work during frost, was held to render it an exceptive contract, and defeat the settlement. That stipulation is similar to the provision here, respecting the repairs of the machinery for working the colliery. But *Rex v. Gateshead* is a decisive authority against the settlement. In that, the stipulations were nearly similar to those in the present case, and the Court held, that *Rex v. Edgmond* was not distinguishable from it. If those two cases were pro-

perly decided, they must govern this, and consequently the order of Sessions must be quashed. He also relied on *Rex v. North Nibley*(a).

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The COURT took time to consider of the case, and judgment was now delivered by

BAYLEY, J.—The only question in this case is, whether the hiring was conditional or exceptive. Many cases of a nature similar to the present, are to be found in the books, and the distinction between them is certainly subtle, and at first sight not easy discernible. But, adverted to them in an aggregate view, the real distinction seems to be this; where the bargain is originally made for an entire year, and terms are introduced indicating a continuance of the relation of master and servant during the whole year, but there is also a provision, that in a given event it shall be in the power of either party to suspend or terminate the service for a part of the year; still, if the service is in fact performed during the whole year, and neither party avails himself of the condition, a settlement is gained. For this purpose, a conditional hiring is the same as an absolute hiring, if the condition is not acted upon. But where by the terms of the bargain, the relation of master and servant will not subsist during a whole year, without some further arrangement being made between the parties, the hiring is exceptive, and therefore where the agreement is to exclude days or hours from the service, that is an exceptive hiring. It was contended, in argument, that both days and hours were excluded from the service in this case, by the terms of the agreement, but we are of a different opinion. The pauper was hired by indenture, and the agreement was, that the master should pay 1s. 10d. for every good day's

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work not exceeding fourteen hours, and 2*d.* per day more when that time was exceeded. It was argued, that by that agreement, the pauper was at liberty to absent himself from work at the termination of the fourteen hours, and that the master could not compel him to work beyond that limited period. But we are of opinion, that the period of work was mentioned only as the measure of wages, that the contract does not impose any limit upon the work, which ought to be reasonably exacted by the master; and that the relation of master and servant continued throughout the whole twenty-four hours. With respect to the forfeitures, we are also of opinion that the pauper was not at liberty upon the payment of them, to withdraw himself from his work as he thought proper, but that they were mentioned merely with the view of compelling uninterrupted attendance; and this view of the case is strongly corroborated by the subsequent stipulation, that nothing expressed in the indenture should be so construed as to abridge the ordinary jurisdiction of the Magistrates. The clause relating to the repair of the machinery has also been relied upon in favor of the appellants, and undoubtedly if that can be considered as an exception, this was a contract, not for an entire year, but for a year, *minus* seven days. We are, however, of opinion, that it cannot be so considered, but that this was a contract for a year, with power to the master to stop the work, if he should think right to do so. If he had done so, the question for our consideration would have been different, but that fact is not found by the case, and therefore this was a bargain for a year, with liberty to suspend the service, and was consequently a conditional, not an exceptive hiring. The distinction between a condition and an exception will be found consistent with all the decisions upon this subject. Wherever it has been held that a servant having liberty to absent himself,

is not entitled to a settlement, it will be found, either that he had in fact taken advantage of that liberty, or that the time was by necessity excepted out of the original contract. But neither of those alternatives is found here; this, therefore, is a conditional hiring, and as the condition has not been acted upon, the pauper has gained a settlement in *Byker*. The order of Sessions consequently was correct, and must be confirmed.

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Order confirmed(a).

(a) Vide 2 Bott. 211. 217. Burr. S. C. 280. 458. 753. 1 Dougl. 391. 1 East, 599. 1 B. & A. 322. 2 Id. 520. 1 M. & S. 622. 3 Id. 299.



The KING v. The INHABITANTS of BAWBURGH.

TWO Justices, by order, removed *William Peas* from *St. Andrew's*, in *Norwich*, to *Bawburgh*, in *Norfolk*, and the Sessions, on appeal, confirmed the order, subject to the opinion of this Court, on the following case:—

The pauper is an illegitimate child, born in *Great Melton*, in *Norfolk*. By indenture of apprenticeship, dated 11th May, 1819, he was bound apprentice to *Henry Sapy*, a bricklayer, at *Bawburgh*, for seven years. The indenture was executed by the churchwardens and overseers of *Great Melton*, by *Sapy*, and by the pauper, attested by the clerk of the Magistrates; and beneath the signatures of those parties was a consent by two Magistrates to the binding, but the signatures of the latter were not attested, nor did it appear whether they were affixed before or after the execution of the indenture by the other parties. The Magistrates' order for the binding was regular, and was referred to in the indenture, but not by the date

Where a parish apprentice was bound by two Justices, and the order was referred to in the indentures, but not by the date thereof: Held, that the indentures were void by 56 Geo. 3. c. 139. ss. 1 & 5, and conferred no settlement by service under them.

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thereof. The indenture bore no stamp. Ten pounds were paid by the parish officers of *Great Melton*, to *Sapy*, as a premium for the binding. The pauper resided with *Sapy*, and served him under the apprenticeship for upwards of a twelvemonth, when *Sapy* failed, and the pauper, with his consent, left him, and worked and lodged with another master, at *Bawburgh*, for more than forty days, and finally became chargeable to that parish. The question for the opinion of the Court is, whether the indenture of apprenticeship was a valid one, by the statute 56 Geo. 3. c. 139, and as such conferred a settlement by indenture and service under it.

Marryatt, in support of the order of Sessions. The first objection is, that the indenture does not specify the date of the Magistrates' order of apprenticeship. Now, section 1 of 56 Geo. 3. c. 139, does not require that the indenture shall set out the date of the Magistrates' order in full, it is only to be referred to; and therefore the omission of the date will not afford a ground for defeating the settlement, and will not necessarily avoid the indenture, although the fifth section requires it to be signed, "as hereinbefore directed." There is no previous direction that it shall be signed when the order is dated, setting out that date, and as the word "hereinbefore" restrains the mode of signature to the previous enactments, and yet cannot be rejected, although there are no such previous enactments, this omission cannot be held to avoid the instrument. This principle has been expressly laid down with reference to leases, *Doe v. Godwin*(a), and there is no reason why it should not equally apply to the instrument in this case. The Court will presume, that the Magistrates have strictly discharged their duty, unless the contrary is shewn; and the contrary is not shewn here.

(a) 4 M. & S. 265.

He was proceeding to the other points intended to be raised in the case, when

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The COURT interposed, and, without hearing *Robinson*, *contra*, proceeded to give judgment.

BAYLEY, J.—It is not necessary to hear any further argument, because it is quite clear by the first and fifth sections of the statute, that the indenture is void, for not setting out the date of the Magistrates' order of apprenticeship. With reference to this point, the first section provides, that "such order shall be referred to by the date thereof, and the names of the said Justices in the indenture of apprenticeship." With this requisite, the indenture does not comply, and therefore it is in this respect clearly voidable. The fifth section goes on to declare, that "no settlement shall be gained by reason of such apprenticeship, unless *such* order shall be made, and *such* allowances of *such* indenture shall be signed, as hereinbefore directed." The word "*such*," as here introduced, is by no means an immaterial word, but evidently implies, that no indenture shall be valid to confer a settlement, except such an one in all respects as the preceding section has described. This is not such an indenture, and therefore by the very expressions of the statute it is necessarily and absolutely void. Upon this single point, therefore, without reference to the other objections, I am of opinion, that no settlement has been gained by service under this indenture, and consequently the order of removal, and the subsequent order of Sessions must be quashed.

BEST, J.(a), concurred.

Orders quashed.

(a) *Holroyd*, J., was absent, at the Old Bailey.

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The KING v. The INHABITANTS of LAMBETH.

Where an appeal was entered at the *Easter*, and respited until the *Midsummer* Sessions, and on the 24th *June* a copy of the order of respite was served on the respondents, without any notice of trial, and the respondents appeared at the following Sessions in *July*: Held, that the Sessions were bound to hear the appeal, though no other notice of trying the appeal had been given than the service of the order of respite.

THE order of removal in this case was dated on the of *April*; on the first day of the ensuing Sessions, which was the 15th of *April*, the appellants entered and respited their appeal, and the order of respite was dated on that day. On the 24th *June*, a copy of the order of respite was served upon the respondents, but no notice of trying the appeal was given. The appeal stood in the paper for trial at the next Sessions in *July*, at which both parties appeared, but the respondents declined going into their case, objecting, that as no notice of trial had been given, they were not bound to appear and try, and the appeal, in point of practice, could not be heard; they contended that there was, in fact, no appeal before the Court, and claimed to have the order of removal confirmed. The Justices being of opinion that the objection was well founded, confirmed the order, subject to the opinion of this Court upon the point of practice.

G. Cross, in support of the order of Sessions. The respondents having received no notice whatever of appeal, were not bound to appear and support the order of removal, and consequently there was in fact no appeal, and the Sessions had no alternative but to confirm the Justices' order. The appellants entered, and respited the appeal at the first Sessions, under the authority of the statute 9 Geo. 1. c. 7. s. 8. and the service of the order of respite, was merely a part of that proceeding, and did not at all obviate the necessity of giving a reasonable notice of the appeal itself, and their intention to try at the next Sessions. The notice of appeal was necessary long before that statute was passed, and the want of it has been

eld to be good ground for the Sessions to dismiss the appeal, *Rex v. Stroud* (a), and *Rex v. Bucks* (b), in which latter case, *Lawrence, J.*, commenting upon that statute, declares, that it leaves the necessity of the notice of appeal precisely the same as it was before the statute had passed. [*Best, J.* Was not the order of respite in effect notice of appeal, as in this Court an order of *Nisi prius*, making a cause a *remanet*, supersedes the necessity of a fresh notice of trial? (c).] In this case there never was any notice of appeal at all, for the order of respite cannot be considered as a notice that the appellants mean to try. This mode of proceeding was likely to be prejudicial to the respondents, because, if they had accepted this notice as a sufficient notice of trial, and had appeared to try, and the appellants had absented themselves, the respondents could not have been allowed their costs; for the 8 & 9 *Wil. 3. c. 30. s. 3*, empowers the Sessions to award costs only, upon proof made before them of a notice of appeal having been given, which the respondents certainly would not have been in a situation to prove. [*Bayley, J.* Then, as the respondents did not appear at the Sessions, either for the purpose of trying the appeal, or of applying for their costs, (and the last argument would assume, that they did appear for neither of those purposes,) why did they appear at all?] The respondents appeared in order to inquire in what stage the appeal really was, for of that they were necessarily ignorant. [*Bayley, J.* The respondents did appear, which they would not have done had they not received the order of respite; and therefore it is clear that they treated that order as a valid notice of trial. Then ought they afterwards to turn round and treat it as a nullity?] It was in fact, and according to the rules of Sessions practice, a nullity; it is perfectly

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(a) 1 Str. 315.

(b) 3 East, 342.

(c) *Shepherd v. Butler*, 1 Dow. & Ry. 15.

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new to consider an order of respite as equivalent to a notice of trial. It never has been so considered; therefore the respondents have had no notice of trial, and the Sessions being on that ground authorized to dismiss the appeal, their order must be confirmed.

Marett, *contra*, was stopped by the Court.

BAYLEY, J.—I am quite satisfied, that the service of the order of respite, served, as it was, more than two months after the date of the order itself, was a good substantial notice of trial for the next Sessions. The respondents could not possibly understand it in any other light, nor could the appellants have served it for any other purpose. The appeal, therefore, has been improperly dismissed, and justice requires that it should go down to the Sessions to be heard upon the merits.

BEST, J. (*a*) concurred.

Order of Sessions quashed.

(*a*) *Holroyd*, J., was absent.

The KING v. The INHABITANTS of ST. PANCRAS,
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The 35 Geo. 3.
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 does not pre-
 vent a person
 from acquiring
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BY an order of two Justices, *Kitty*, the wife of *William Buchan*, was removed from *Lambeth*, in the county of *Surrey*, to *St. Pancras*, in the county of *Middlesex*, as the place of her last settlement. The Sessions, on appeal,

is no residence for a whole year, as required by 59 Geo. 3. c. 50.

confirmed the order, subject to the opinion of this Court, on the following case:—

The husband of the pauper occupied a house in *Thornhaugh Street*, in the parish of *St. Pancras*, and resided in the same for a period not exceeding nine months, and subsequently to the 2d day of *July*, 1819, at the yearly rent and value of 80*l.*; and during such occupation, was regularly rated by, and paid a poor rate to the parish of *St. Pancras*, as such occupier of the said house. The question for the opinion of the Court is, whether the pauper's husband gained a settlement in the parish of *St. Pancras*, by being so rated at, and paying his share towards the public taxes and levies of the said parish, under the 3 & 4 *W. & M.* c. 11. s. 6, and 35 *Geo.* 3. c. 101. s. 4.

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Cowley, in support of the order of Sessions. The question is, whether the 3 & 4 *W. & M.* c. 11. is or is not absolutely repealed by 35 *Geo.* 3. c. 101. If it be not, then it is clear that in this case the pauper gained a settlement under the circumstances above mentioned. By s. 6. of 3 & 4 *W. & M.* it is enacted, "That any person coming to inhabit in any parish charged with and paying his share towards the public taxes of the said parish, shall gain a settlement." Standing alone, it is quite clear, that under this section a settlement might be gained by paying rates or taxes in respect of a tenement of any value whatever. What then is the effect of 35 *Geo.* 3. c. 101? No more than to limit the operation of the previous act as to the value of the tenement. By section 4. it is enacted "That no person shall gain a settlement by being charged with and paying his share towards the public taxes or levies of the said parish, for, or on account, or in respect of any tenement, *not being of the value of 10*l.**" It is quite obvious that the operation of

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this latter statute is not to repeal the former, but merely to limit it to tenements which are of the value of 10*l.* and upwards. A settlement therefore may still be gained by the payment of rates in respect of tenements. Undoubtedly in *Rex v. Islington*(a), Lord Kenyon said, that the Legislature, in passing the 35 Geo. 3. intended to make an end of this head of settlement in future: but that was an *obiter dictum*. It is true also, that in *Rex v. Penryn* (b), Lord Ellenborough expressed himself to the same effect; but Abbott, J. in that case seemed to be of opinion that the operation of the statute was merely to prevent the acquisition of settlements by "paying rates for tenements of very small value." In *Rex v. Cheshunt*(c), it was decided, that a person residing on a tenement of more than 10*l.* annual value, could not gain a settlement, except by paying rates. There, however, the pauper was a servant of the Crown, and resided on a tenement belonging to the public, and consequently could not gain a settlement by such residence. There being nothing in the 35 Geo. 3. which expressly takes away the settlement by paying rates or taxes, the decision of the Sessions was right. The statute 59 Geo. 3. c. 101. has no reference whatever to this question, because that act is confined solely to settlements by renting tenements.

Barnesall, contra, contended, that the operation of 35 Geo. 3. c. 101. was altogether to do away with the head of settlement by the payment of rates and taxes. Prior to that statute the settlement by payment of rates and taxes was never had recourse to unless the pauper had rented a tenement of less than 10*l.* annual value; therefore, when it was enacted, that no settlement could be gained by paying rates or taxes for such a tenement, it was obvious that the Legislature intended to put an end

(a) 1 East, 283.

(b) 5 M. & S. 443.

(c) 1 B. & A. 473.

to that head of settlement. This was the opinion of Lord *Kenyon* in *Rex v. Islington*, and of Lord *Ellenborough* in *Rex v. Penryn*. It was observable, that Mr. *East*, the reputed author of this statute, in his report of the first-mentioned case, added a note to the text, without intimating any disapprobation of what was stated by the Chief Justice. Indeed, Lord *Ellenborough* in the latter case, expressed a decided opinion upon the subject. His Lordship said, "This enactment was undoubtedly meant to abrogate this head of settlement, and the authorities upon it, which, perhaps, had been carried to some degree of absurdity. Lord *Kenyon* appears to have considered the operation of the act; and I am glad that we have his authority for it. If this construction of Lord *Kenyon* had not been felt to be the correct one, I doubt not that we should have had some observation upon it from the learned Reporter, with whom the act originated, and which is generally known by his name." The 59 Geo. 3. so far from being beside the present question, afforded a very strong argument in favor of the construction now relied on, for although that statute appeared from the preamble to be confined to settlements gained by the renting of tenements, yet it enacted, "That no person shall acquire a settlement by or by reason of dwelling for forty days in any tenement, unless it be held for the term of one whole year, and the rent paid for a year, &c." If, therefore, a settlement might be gained in every case by paying the smallest amount of rates, although the tenement might not be held for a year, and although no rent was paid, a pauper might be said to gain a settlement by reason of dwelling on a tenement, and this statute would be repealed by implica-

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The COURT took time to consider the case, and

BAYLEY, J. now delivered judgment. The question raised in argument in this case was, whether the right to gain a settlement, by being rated and paying taxes, was still subsisting at the time the pauper's husband was rated and paid; the tenement which he occupied being of the yearly value of 10*l.* or upwards. It is clear that the husband could not gain a settlement by renting the tenement, because he had not been in the occupation of it during the period of one whole year, as required by the statute 59 *Geo. 3. c. 50.* For the purpose of deciding the question, we must advert to the language of 35 *Geo. 3. c. 101. s. 4.* by which it is enacted, "That no person or persons whatsoever, who shall come into any parish, township, or place, shall gain a settlement in such parish, township, or place, by being charged with and paying his, her, or their share towards the public taxes of the said parish, township, or place, for, and on account, or in respect of any tenement or tenements, not being of the yearly value of 10*l.*;" and it was argued, that this head of settlement was entirely destroyed by that section. We must consider what was the state of the law upon this subject before the 35 *Geo. 3.* passed. As the law then stood, a person rated and paying taxes for a tenement, whatever might be its value, thereby acquired a settlement. In such case the parish was considered as having adopted him as one of their parishioners. In most instances, where the tenement was of the annual value of 10*l.*, the occupier would gain a settlement on other grounds. During the argument, however, one instance was referred to, in which a party occupying such a tenement would not acquire a settlement, unless on the ground of paying rates. This was the case of *Rex v. Cheshunt*, where the pauper was living

in a house belonging to the King, as a servant of the public. It is to be observed, that the words of the section to which I have referred, do not in terms import an intention on the part of the Legislature to abolish this head of settlement altogether. They are clearly qualified, and apply in direct terms to tenements *not being of the yearly value of 10l.* Before we give a general effect to words which are not in themselves general, we ought to see clearly that such was the intention of the Legislature. We think it would be going too far to give a general effect to the words of this act, when we find that "being rated and paying," as applied to a tenement of above the value of 10l., was one medium by which a settlement in all cases might be obtained, and in some instances the only medium. The cases of *Rex v. Islington* and *Rex v. Penryn*, referred to in argument, are certainly at variance with the opinion of the Court as at present constituted. In the former case the point did not properly arise, and the opinion of Lord Kenyon was quite extra-judicial. The only question in that case was, whether the operation of 35 Geo. 3. c. 101. s. 4. was limited to persons who should thereafter come into any parish, or whether it extended to persons residing there before. That question was again brought under the consideration of the Court in *Rex v. Penryn*, when Lord Ellenborough certainly gave a decisive opinion, that it was the intention of the Legislature entirely to abolish this head of settlement. On that occasion, the present Lord Chief Justice is reported merely to have said, that it was expedient to do away settlements by paying rates for tenements of very small value. From the report of that case, it does not appear whether my Brother Holroyd or myself were present. These two authorities naturally drew the attention of the Court to consider carefully the words of 35 Geo. 3, and the state of the law as it existed before the passing of that act.

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Had no case occurred before that time, in which the occupier of a tenement of 10*l.* yearly value would gain a settlement by the payment of rates, and on that ground alone, then probably the words of the statute might be construed to have a general operation, and to destroy this head of settlement entirely; but one instance has been mentioned, and possibly there may be others, where, before the 35 *Geo. 3.* a settlement could not be gained by the occupier of such a tenement, unless by the payment of rates. Under such circumstances we think we are not warranted in saying that these qualified words were intended by the Legislature to have a general and unqualified operation, so as to annihilate entirely this head of settlement. Possibly it might have been supposed at the time when 59 *Geo. 3.* was passed, that this head of settlement no longer existed; and we have given our opinion as early as we conveniently could, in order, that if such idea existed, the error may be amended during the present Sessions of Parliament.

Order of Sessions confirmed.

The KING v. The INHABITANTS of ST. FAITH'S,
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Where a married woman, upon the death of her husband, assumed her maiden

name, and after the lapse of several years was married, by banns, to a second husband in that name, with the description of "widow:"—Held, that in the absence of fraud, such marriage was legal, and that her settlement followed that of the second husband.

TWO Justices removed *Ann Lovick* and her son from *St. Margaret's, Norwich*, to *St. Faith's, Newton*; and on appeal by the latter, the Sessions confirmed the order,

subject to the opinion of the Court, upon the following case :—

The pauper, whose maiden name was *Ann Lovick*, was married on the 14th *September*, 1812, in the parish of *St. Helen, Norwich*, to one *James Browne*, a man of colour, whose settlement is unknown, and who was then a private soldier in the 69th regiment of foot. About half-a-year afterwards, *Browne* went to *Ipswich*, and the pauper, at his request, followed him thither, and remained with him there a few weeks, when she returned to *Norwich*, and never saw or heard any thing of her husband afterwards, except that a report reached her of his death by drowning, but it is not otherwise known when he died, or whether he is dead. On the 31st *March*, 1822, and after the pauper had received such information of the death of *Browne*, she was married by banns, in the parish of *St. Michael, Coslany, Norwich*, to *William Rigg*, widower, by the name and description of *Ann Lovick*, widow. Both at *Ipswich*, and after her return to *Norwich*, the pauper went by the name of *Ann Lovick* only, till her marriage with *Rigg*. The settlement of *Rigg* was proved to be in a third parish in *Norwich*. If the Court should be of opinion that the second marriage was legal, then the order of removal and the order of Sessions are to be quashed; if otherwise, to be confirmed.

H. Cooper, in support of the order of Sessions. The Court will act on the positive authority of *Rex v. Twinning(a)*, and will presume the death of the first husband, rather than the commission of the crime of bigamy by the wife; and therefore it is unnecessary to discuss that point. The only question is, whether the second marriage was legal, and, under all the circumstances of this

(a) 2 B. & A. 286.

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case, the Court will be of opinion in the negative. This case is distinguishable from *Rex v. Billingshurst* (a), because there no other name but that by which the party was married, had ever been used by him, but here the name of the first husband was used by the pauper for some time. [*Bayley, J.* But the case of *Rex v. Burton-upon-Trent* (b), is free from that distinction; there the pauper was never known except by the assumed name under which he was married, and yet the marriage was held legal. Is not that case decisive of the present?] That case was decided upon the principle, that the name was not assumed for the purpose of fraud; but that is not the question here, nor ought the question of the validity of a marriage to be confined to so narrow a scope. It is a question of public policy, involving the public interest, and should be so considered. [*Best, J.*—In point of fact, was not *Lovick* the pauper's real name? Had she not acquired it, and made it her own by long use? The late case of *Doe v. Yates* (c), has decided, that the assumption and long use of the name is sufficient to satisfy the words "bearing a name" under a devise, without taking it by an Act of Parliament.] The pauper here, had by her first marriage, acquired another legal name, and she had no authority to lay that aside and resume her maiden name. Great mischief would attend the exercise of such authority, for it would utterly annihilate that notoriety of the parties about to be married, which the Legislature thought so essential. [*Best, J.* According to that reasoning, every man who has changed his name by license, ought to be married under an alias.] The pauper was not married by her true name, for her husband's name was her's, and she had no title to any other. It is said by Sir *William Scott*, in *Frankland v. Nicholson* (d), "the statute requires the

(a) 3 M. & S. 250.

(b) *Id.* 557.

(c) 1 Dow. & Ryl. 187.

(d) 3 M. & S. 259, note 1.

true christian and surname, and unless there be a publication to that effect, and it cannot be qualified; the marriage must be pronounced null and void." Now here there was not a publication of the true surname, and therefore the marriage is void. [*Bayley, J.* In that case there was no evidence that the woman had ever been generally known by the assumed name; and that makes a wide distinction between the two cases.] The question in cases of this nature is, not whether the public, or any individual, *has* in fact been misled, but whether it is possible that any *one may be* misled, by the concealment of the real name. Now here, persons certainly might have been misled. At all events the pauper was not truly described when she was called "*Ann Lovick, widow*;" for if she was a widow, she was *Ann Browne*. In point of fact, therefore, the real name of the pauper was not published and used at her second marriage, and consequently, both according to the spirit and the letter of the law, that marriage is null and void.

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*Robinson*, contra, was stopped by the Court.

BAYLEY, J.—The object of the statute was to make it notorious to the world who were the parties that were about to enter into the married state, and therefore wherever the name is fraudulently assumed or concealed, that object is defeated, and the marriage is void. But when the party has assumed a new name, not for any fraudulent purpose, but fairly and openly, and has for a considerable period used and been known by that name, then, it has been in several cases decided, a marriage under that name is valid. The name in this case does not appear to have been assumed for the purposes of the marriage, or for any improper purpose; and under the circumstances of this case, at least as much notoriety

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was given of the person of the pauper by the name of *Lovick*, as could have been given by that of *Browne*. The former was her maiden name, she had gone by it for many years, and was therefore more likely to be recognized by that name than by the other. The mere fact that some one individual *may* be deceived, is not sufficient to annul the marriage; the name must be assumed fraudulently. That has long been the rule of construction upon this subject, and that rule is acted upon in the cases that have been cited. I am therefore of opinion that this is a valid marriage, and that a different decision would be very likely to produce much mischief; for where a party has several names, one of them may easily be omitted by accident or mistake, and would it be a most grievous thing, if every marriage solemnized under such circumstances was to be deemed illegal.

BEST, J. (a).—I should pause long before I brought my mind to give a judgment that at all tended to overturn the decision of a Judge for whom I entertain so high a respect as my Lord *Stowell*; but I am quite convinced, that in substantiating this marriage, we are acting upon the very principle which is so ably laid down in the case of *Frankland v. Nicholson*. The pauper here had acquired the name of *Lovick* by long use and general reputation, and it seems evident to me, that the fact of the marriage would have been far less notorious had the banns been published under the name of *Browne*, than it was by a publication of them under that of *Lovick*. It has been asserted in the argument, that a married woman cannot legally bear any other name than that which she has acquired in wedlock; but the fact is not so; a married woman may legally bear a different name from her husband, and very many living instances might be quoted

(a) *Holroyd*, J. was absent, at the Old Bailey.

in proof of the fact. Besides, the pauper in this case was in the eye of the law a *fême sole*; she might adopt any name she thought proper, and seven years use of any adopted name would by law identify that name as her own. This woman had borne the name of *Lovick* during a space of ten years, and nothing was so natural, or so well calculated to render the fact of her marriage notorious, as her publishing the banns in that name. I fully agree, therefore, that this was a valid marriage.

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### Order of Sessions quashed(a).

(a) See *Mather v. Neigh*, in the Consistory Court, *Trin. 47 Geo. 3*, and 1 Nolan's P. L. 267.

### The KING v. The INHABITANTS of YALDING.

BY an order of two Justices, *John Russell, Ann* his wife, and their seven children, were removed from the parish of *Yalding*, to the parish of *Marden*, both in the county of *Kent*; and on appeal, the Sessions quashed the order, subject to the opinion of the Court, on the following case:


At the hearing of the appeal, it was admitted, that the pauper had gained a settlement about twenty-nine years since, in the appellant parish, by yearly hiring and service. The manor of *Aylesford* is a manor of the ancient demesne of the Crown, the Court-rolls of which have been regularly kept for a long series of years, and the borough of *Rugmorhill* is a district within the said manor, extending into seven parishes, and some part of it lying

Where the court-leet of the manor of *A.* appointed a person to be street-driver of the borough of *R.*, a district within the manor, extending into seven parishes, in one of which he afterwards became chargeable as a pauper, and it appearing, first, that it was not an annual office; second, that he took no oath of office; and third, that

he had not served under the appointment for one whole year:—Held, that he had not such a public annual office or charge as would gain him a settlement under 3 W. & M. c. 11. s. 36.



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within the parish of *Yalding*. At a court-leet holden for the manor of *Aylesford*, it has been usual from time immemorial to appoint certain officers, namely, constables and borseholders, such officers being always expressed to be appointed to serve "for the year ensuing, and sworn to discharge the duties of their office. A custom of appointing an ale-conner at the court-leet, has also existed in the manor from time immemorial, but it does not appear that that officer was ever sworn to execute his office. Since the year 1793, the office of weigher of weights and measures has been added to that of ale-conner. These latter, as well as the street-driver hereafter mentioned, have been appointed from time to time at the same court-leet as the constables and borseholders, although not expressed to be "for the year ensuing." At a court-leet holden in 1750, a street-driver of the borough of *Rugmorhill* was appointed for the first time. Similar appointments took place in 1753, 1764, 1772, and 1784, and from that time to the present, thirty-eight courts-leet have been held, at each of which a street-driver has been appointed, with the exception of the year 1798, no court having been held in that year. But in the year 1799, two courts-leet were held, one in *January*, and one in *November*, at which the appointments were in the same form as in other instances, so that such officer, together with the constables, borseholders, &c. has been appointed on the days of holding the court-leet, which have occurred at intervals, sometimes of more, and sometimes of less, than a year; but it does not appear that he was ever sworn to discharge the duties of his office, or that there is any oath applicable to the office. In the record of the proceedings of a court-leet holden for the manor of *Aylesford*, on the 19th of *January*, 1813, is the following entry, among several others, of a presentment of the Jury:— Also they present and appoint *John Russell* to be street-

driver of and within the borough of *Rugmorhill*, within the said manor." On the 8th of *January*, 1814, the pauper was again appointed in a similar form, and a third time on the 20th of *February*, 1815. The pauper never appeared at the courts at which he was nominated, and was never sworn. He discharged the duties of the office in person from the 19th of *January*, 1813, up to his re-appointment on the 8th of *January*, 1814; he also served in person for a short period after his re-appointment in 1814, but another person, to whom he paid no compensation, served, at his request, in his stead, during the remainder of 1814, and after his appointment in 1815; including, however, his services under the first and second appointments, he served the office in person for more than a whole year. During the years 1813, 1814, and 1815, he resided in the respondent parish, but not in that part of it which is situate within the borough of *Rugmorhill*, where his duties were to be executed. No part of his residence was under a certificate. The question for the opinion of the Court is, whether, under these circumstances, the pauper gained a settlement in the parish of *Yalding*.

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D. *Pollock*, in support of the order of Sessions. There are three objections raised to the sufficiency of the settlement claimed by the pauper in this case; first, that the situation filled by him is not a public office within the meaning of the statute 3 *W. & M. c. 11. s. 6*; second, that he was never legally placed in the office, inasmuch as he was not duly sworn in upon his appointment; and third, that he did not personally serve the office during a whole year, nor on account of the whole parish. With respect to the last point, the case of *St. Thomas, Winchester v. St. Mary, Winchester* (a), is decisive to shew that the service in this instance is sufficient. [*Bayley, J.*

(a) Burr. S. C. 27.

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There the pauper executed the office throughout the whole of the parish in which he resided, and therefore it was fairly to be presumed that it was notorious to every inhabitant of the parish, that he did in fact hold the office.] There are many other cases which shew, that the duties of the office need not extend over the whole of the parish in which the pauper resides. [*Bayley, J.* Is there any case in which it has been held, that the serving an office in one part of the parish, and residence in another, affords sufficient notoriety, and is a sufficient service to confer a settlement?] Perhaps no case is to be found, that expressly goes that length; but upon the general principle of the rule, and by analogy to other cases, it would seem that residence in any part of the parish is sufficient. [*Bayley, J.* That will hardly be enough to support this settlement; but independently of that point can this situation be called an "office" within the meaning of the statute?] A variety of cases have been decided upon that subject, but no strict or definite rule has ever yet been laid down. The words of the statute are "office or charge;" and at least the pauper's employment in this case seems to satisfy the meaning of the latter term.

Berens, contra, was stopped by the Court.

BAYLEY, J.—It is unnecessary to go more at large into the objections raised upon the face of this case, because it is perfectly clear that the office held by this pauper, is not a public annual office or charge within the meaning of this statute. This person was appointed a one court-leet to serve till the next; the interval between the two courts did not amount to a year, and the courts were held at various intervals, *ad libitum*. Therefore he was neither appointed for a year, nor did he serve a year; the office was neither in its nature annual, nor was the

intment to it annual; and one or the other of those characteristics is absolutely necessary. I entertain very considerable doubt whether his residence was such as to afford due notoriety of his being the person who held the office, and also whether, not being sworn, he was legally qualified with the office; but it is not necessary to decide upon these points, because the settlement is evidently insufficient upon the ground already noticed. This is not a permanent annual office in its nature, and the pauper was appointed to it for a year; and therefore it is not an office as is necessary to confer a settlement.

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1ST, J. (a).—Upon the point last alluded to by my brother Bayley, it is quite clear, that no settlement has been gained in this case. There must be either an appointment to an office to serve for a year, or an appointment to an office which by its nature is annual; and here is neither the one nor the other. I am also inclined to think that the pauper's residence was insufficient. The principle upon which the Courts have been accustomed to decide what is or is not good residence, is, that there must be such a residence as necessarily renders it notorious to all the parish that the officer is within it. Now, there is no such notoriety, nor from the very nature of the residence, can be. This case also comes within the very distinction laid down by Lord Kenyon in the case of *Whittlesea* (b), namely, that an appointment by the parish at large is good, but that by individuals is not; and as this pauper was clearly appointed by a portion of the parishioners only.

Order of Sessions quashed.

(a) *Holroyd*, J. was absent, at the Old Bailey.

(b) 4 T. R. 807.

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## The KING v. JOHN WEBSDELL.

The manufacturer of goods cannot, without a hawker's license, vend his wares in any other than the places enumerated in 50 Geo. 3. c. 41. s. 23; and a manufacturer hawking his goods in a different place, without any license so to do, may be convicted in a 10*l.* penalty only, under sec. 17, of the act, although sec. 20 imposes a 40*l.* penalty for an offence apparently of the same description.

**CONVICTION** under 50 Geo. 3. c. 41, for hawking shoes without a license, whereby the defendant was adjudged to pay a penalty of 10*l.* The information set out on the record of conviction stated, that defendant on a certain day, at *Cromer*, in the county of *Norfolk*, was a hawker and trading person, going to other men's houses, and travelling, &c. and being such person, did, on the day aforesaid, at *Cromer*, carry to sell, and expose to sale, divers goods, wares, and merchandize, to wit, a quantity of shoes, and was then and there found trading without any license so to do; whereupon he was summoned, &c. and the Justices did convict him of the said offence, and adjudge that he had forfeited the sum of 10*l.* On appeal, the Sessions quashed the conviction, subject to the opinion of this Court, on the following case:—

It was distinctly proved, on the part of the appellant, that he was a shoemaker, and that he was the real worker or maker of the shoes in question, which he “carried to sell, and expose to sale;” but inasmuch as it appeared from the evidence, that *Cromer* was not a mart, market or fair, nor a city, borough, town corporate, or market town, the Court were of opinion that the conviction was right, although the words “or elsewhere,” omitted in 50 Geo. 3. c. 41. s. 23, are in the 9 & 10 Wil. 3. c. 27 s. 9. It was then objected on behalf of the appellant that the conviction was bad in point of form, on two grounds; first, because in setting forth the offence, it was not stated that the shoes were not of the manufacture of the appellant; and secondly, because the conviction was under sec. 20 of 50 Geo. 3. c. 41, and that therefore the penalty adjudged, if any had been incurred

ould have been 40*l.* instead of 10*l.* On these grounds conviction was quashed.

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*I. Cooper*, in support of the order of Sessions, conceded, first, that the defendant was not liable to any penalty whatever; and second, that supposing him liable, conviction was founded on a section of the statute, which did not give the penalty adjudged. As to the first point, it must now be taken from the finding of the Sessions, that the defendant was the manufacturer of the shoes which he offered for sale; and if so, then he is expressly protected by s. 9, of 9 & 10 *W. 3.* c. 27, by which it is declared, "that nothing in that act contained shall tend to hinder the real workers or makers of any goods or wares within the kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed*, &c. from carrying abroad or exposing to sale, or selling any of the goods or wares of his, her, or their own making, in public marts, fairs, markets, or elsewhere." Nothing can be more extensive than these words; and if that statute is unrepealed, it is clear that this defendant is exempted from any penalty. It certainly is not repealed by Geo. 3. c. 41, except in so far as respects the amount of the penalties, because the 9 & 10 *Wil. 3.* c. 27, is not expressly recited, and it incorporates that and all other acts relating to the same subject. Both acts were passed in *pari materia*, and although the words "or elsewhere" have been dropt in the latter statute, still there is no repugnancy between the two. This must virtually be treated as a conviction under the statute of *Wil. 3.*, and consequently the defendant was authorized in selling the shoes in question, at *Cromer*, although it is not a market town, &c. because the words, "or elsewhere," would be sufficient to justify him as the real manufacturer, in selling his goods without a hawker's

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license, in any place whatsoever. Any other construction would be irreconcilable with the plain language of the two statutes. Then, secondly, supposing the defendant liable to some penalty, he has been convicted and adjudged under the wrong section. If he was liable to any penalty, it was to a penalty of 40*l.* imposed by sec. 20 of 50 *Geo. 3. c. 41.* By sec. 6, a duty of 4*l.* annually is imposed on every hawker. The 17th section enacts, "that if any such hawker shall trade without, or contrary to, or otherwise than as shall be allowed by such license, he shall forfeit the sum of 10*l.*" Now this section obviously applies to the case only of a person who, having regularly taken out a license, shall travel without it upon his person, or having taken out a license, shall trade contrary to the terms of it. Then comes the 20th section, upon which the objection arises. That section applies expressly to the offence of which this defendant has been convicted, namely, trading without a hawker's and pedlar's license. It imposes a penalty of 40*l.* upon any hawker found trading without a license, or who, being found trading, shall refuse to produce a license when required, and no power is given to the Justices to mitigate the penalty. The defendant, therefore, if he has been guilty of any offence, ought to have been convicted under this latter section, and not under the 17th, which applies to an offence of a totally different description. It is impossible to contend that the 17th and 20th sections both apply to the same offence, for the inference then would be, that the Legislature had imposed two different penalties for the same illegal act, which would be quite repugnant to reason and justice. Having no license at all, might very reasonably subject the party to a heavier penalty than that imposed upon a person who, having taken out his license, has neglected to carry it about his person. Hence the imposition of a larger penalty in the former than in the latter case.

these grounds, therefore, the Sessions did right in giving the conviction, and their order must be confirmed.

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*Russell* and *E. Alderson*, contra, was desired by the court, to address themselves to the second point only. It was rather an unusual ground of complaint on the part of the defendant, that he has not been convicted in so large a penalty as the law imposes; but undoubtedly it lies on the prosecutor to shew that the defendant has been properly adjudged to pay the penalty inflicted. Since the passing of the 50 Geo. 3. c. 41, the 20th section has not been acted upon, the sum of 40*l.* having been erroneously inserted into that section by mistake. Convictions have always proceeded on the 6th and 17th sections, the former of which requires the license to be taken out, the latter imposes a penalty of 10*l.* for trading without a license. But it is contended, that section 17 applies to those cases only where a person, having taken out a license, trades without carrying it about his person, or is contrary to its terms. The case of *Rex v. Turner*, however, is an authority to shew, that the 17th section applies as well to the case where the party has not taken out any license, as where he has taken it out, but fails to carry it with him, or refuses to produce it on demand. In that case the conviction was not for trading contrary to the terms of a license, but for trading without any license whatever, and therefore it is a direct authority. The 17th section embraces two offences; first, a trading without a license; second, a trading contrary to, or otherwise than is allowed by the license. It is clear that the latter provision was necessary, in order that it might be seen whether the mode of trading adopted was conformable to the terms of the license taken out.



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But upon the face of this conviction, there is nothing to shew that this defendant had not a license; and therefore viewing the case in either way, it is plainly and substantially within the 17th section, and the conviction ought not to have been quashed.

BAYLEY, J.—There certainly is a great deal of obscurity in the terms of the 50 Geo. 3. c. 41, nor is it found there for the first time, for it has existed as long since as the 29 Geo. 3. c. 26. Sections 11 and 14, in that statute, are in terms the same as the 17th and 20th sections of the 50 Geo. 3, and the same difficulty as to the 10*l.* and the 40*l.* penalties occur in both statutes. It is contended, that a person who is guilty of the offence of trading without any license whatever, is at events liable to a 40*l.* penalty under the 20th section, and that the Court is not warranted in considering him as coming within the 17th section, which imposes a penalty of 10*l.* But in order to decide that the defendant is not within the latter section, I think we ought to be clearly convinced, because, if the matter admits of a fair and reasonable doubt, we should adopt that construction which would bear with the least degree of hardship upon the individual who offends against the act. There is no power of mitigating the penalty; it must either be 10*l.* or 40*l.*, the Magistrate having no discretion. In considering this subject, we must look to the 17th section, and treat the question as if the case stood upon that only. The words of that section are, "That if any such hawker, &c. so travelling as aforesaid, shall trade as aforesaid, without, or contrary to, or otherwise than as shall be allowed by such license, such person shall, for each and every such offence, forfeit the sum of 10*l.*" Now the words "shall trade *without*," or "*contrary to*," or "*otherwise than as shall be allowed*" by such license, form three propositions; and therefore

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we must take them as if the words "such license," were repeated in connexion with each; and each of these three things would, by the terms of that section, be prohibited. It does not say, such hawker "having obtained a license" and trading; but "if any such hawker shall trade *without, or contrary to, or otherwise than, &c.*" There are no words then, which confine the terms of the section to a person who has previously obtained some license for the purpose of travelling about as a hawker. The fair meaning of the words "shall trade without such license," is, that if any person, without having ever obtained any such license as this act, in its former provisions directs he shall be provided with, shall trade, he shall be liable to a 10*l.* penalty. Perhaps it would be difficult, exactly to see any reason why the Legislature should bear harder upon a man who travelled without any license at all, than upon a man who had obtained a license, to a certain extent, and under colour of that license committed a fraud upon it by going beyond its limits; but without relying upon that, I think the words "shall trade as aforesaid without such license," may mean such license as the former provisions of the act had directed the party should provide himself with; and I do not see in the 20th section such clear words as shew that that is not the construction which ought fairly to be put on the 17th section. From that time down to the present, (as far as there are any authorities upon the subject), the convictions upon this statute for trading without any license at all, have been for the 10*l.* and not the 40*l.* penalty. When *Rex v. Turner* was before the Court, this, if a valid objection, might have prevailed, but it was never suggested, and in practice, we understand convictions have always been for the 10*l.* penalty. In *Rex v. M'Gill(a)*, also which is now *sub judice*, this, if a good objection, would have prevailed, but in that case it certainly was not

(a) Vide post, 82.

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raised. And though I am not at liberty to treat it as an authority, yet, in the last edition of *Burn's Justice*, prepared for the use of Magistrates, a form of conviction for trading without any license whatever is adopted, by the gentlemen who have directed their attention to cases of this description, which in terms describes the forfeiture to be 10*l.* for the offence. It therefore seems to me, that the words "without such license," in the 17th section, are not necessarily confined to a person who has obtained a license, and is travelling without it about his person, but that it extends to persons trading without any license whatever. If that is the right construction, the question then is, whether the 23d section exonerates the defendant from being liable to the penalty, or whether, by virtue of the provisions of the 9 & 10 *W. 3.* he will be exempted. There is no doubt, that if this had been a proceeding under the 9 & 10 *W. 3.* c. 27, and there had been no alteration from time to time in the provisions of that act, except as to the increase of duty, this person would be exempted from penalties for selling wares of his own manufacture, in a market town, &c. or *elsewhere*. But ~~that~~ is not an empowering clause; it merely exempts those who shall pursue conduct of that kind, from being liable to the penalties of the act for trading in that way. The 29 *Geo. 3.* enacts a higher duty, and also contains the prohibitory clause, which is found in 9 & 10 *W. 3.* and that clause being very general, the persons who would have been exempted by the 9 & 10 *W. 3.* would thereby have become liable. Still, however, that prohibitory clause is subject to a proviso, but there is an alteration in the terms of the proviso, which shews that the Legislature intended to limit the exemption. The exemption in the 29 *Geo. 3.* is the same as that in the 50 *Geo. 3.* and in both clauses the words "or elsewhere," are omitted. Why were they omitted? Obviously because the word "elsewhere" must have occurred to the Legis-

lature as being too indefinite, and going farther than was originally intended, and consequently they were left out of both. I am therefore of opinion, that as the 50 Geo. 3. contains a general prohibition, and as the exempting clause only confines the exemption to those persons who shall sell goods of their own manufacture in any mart, market, or fair, and in cities, boroughs, towns corporate, and market towns, and as this defendant did not sell the goods in question in a place falling within this enumeration, he was rightly convicted.

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BEST, J. (s)—I am of opinion that both points are as clearly against the defendant as it is possible for points to be clear in so obscure an Act of Parliament. The substantial objection arises upon the word “elsewhere,” and it is said that that word must, by necessary reference, be introduced into this act. It must certainly, in order to give effect to the argument in favor of the defendant, but we are tied down by the act, as we find it in the Statute Book. By the 9 & 10 W. 3. it appears to me, that the Legislature intended that the real manufacturer of goods should be at liberty to hawk his wares wherever he pleased, but when the 50 Geo. 3. was passed, the same indulgence was not extended to him. By the first act, he might sell where he thought proper without a license, but by the second, he has now a right only to sell in markets, borough towns, cities, &c., and the words “or elsewhere” are studiously omitted. It is contended, that the only effect of the 50 Geo. 3. is to alter the duties, and that we are to construe that statute as if the words “or elsewhere,” had been retained; but s. 31. of 50 Geo. 3. shews, that the statute was meant to go much further than altering the duties, because that clause declares, that all the provisions of the former acts are repealed, except such as are

(s) Holroyd, J., was absent, at the Old Bailey.

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thereby re-enacted. But I do not think it necessary to resort to that clause, in order to strike out the word "elsewhere," because the 53 Geo. 3. creates new duties, and imposes the necessity of taking out licenses at a higher price, and declares that he who has not taken out such a license, cannot hawk his goods about the country at all, and that he who has taken out one can only hawk to the extent which the license allows under the act. This may be a very hard case, and probably this defendant did not know that *Cromer* was not a market-town, and however desirous we might be of finding out some ground for quashing the conviction, still we are bound by the act as we find it. Then, as to the second objection, it is our duty, in construing an Act of Parliament, to reconcile all parts of it if we can. That duty cannot, in this instance, be performed, because it is not easy to reconcile the 17th and 20th sections. Possibly they may be reconciled, by holding, that the man who hawks without having obtained any license at all, shall become liable to the penalty of 40*l.*, but having obtained a license, and hawking without having it about him, he shall be liable to the 10*l.* penalty. Whether that was the true meaning of the Legislature, it is impossible for me to say, but I think the two clauses may be reconciled. It is, however, enough for me to say, that looking at the information here, and the evidence in support of it, this defendant has been guilty of an offence within the meaning of the 17th section. It does not appear that the defendant had no license; all we have before us is, that none was produced, and that perhaps may be sufficient to convict him under the clause imposing a 10*l.* penalty. I am therefore of opinion, that this clause is not so inconsistent with the 20th section, but that the defendant may be rightly convicted in a 10*l.* penalty, although he might have been convicted in the 40*l.* penalty.

Order of Sessions quashed, and  
conviction affirmed.

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## The KING v. The INHABITANTS of BARDWELL.

**BY** an order of two Justices, *Peter Firman* was removed from *Bardwell*, to *Irworth*, both in the county of *Suffolk*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court, on the following case:—About twenty-four years since, the pauper, *Peter Firman*, a married man, was hired for a year by Mr. *Stedman*, of *Irworth*, as his shepherd; he was to have a house and garden rent-free, seven shillings a week, and the going of twenty sheep with his master's flock, as wages. After some time, on provisions becoming dear, and the pauper complaining that his wages were not sufficient for his support, Mr. *Stedman* raised him ten sheep. The pauper lived for two years with Mr. *Stedman*, in the parish of *Irworth*, after his wages were thus raised, during all which time, the thirty sheep went with his master's flock on the farm, the whole of which is situated in that parish. The feed of the thirty sheep was worth sixteen pounds a-year, (exclusive of the house and garden). If the pauper had not been allowed to keep the sheep, he must have had more wages.


*Storks* and *H. Cooper*, in support of the order of Sessions, were stopped by the Court.

*Dover*, contra. This case is not distinguishable in principle from *Rex v. Minster* (a). It was there distinctly held that the pauper gained a settlement by being allowed to feed two cows on his master's farm. In that case, the residence was in the house of the master, and the feed of the cows being worth more than 10*l.* a-year, no doubt was

Where a pauper was hired for a year as shepherd, and was to have a house and garden rent-free, seven shillings a-week, and the going of thirty sheep with his master's flock, as wages, the feed of the sheep alone being worth 16*l.* a-year, and he lived for two years with his master under the agreement:—Held, first, that as it did not appear to have been part of the bargain, that the sheep were to be fed with growing produce; and second, that as the pauper, by residing in his master's cottage as a servant, did not "come to settle," he did not acquire a settlement by renting a tenement within the meaning of 13 & 14 Car. 2. c. 12.

(a) 3 M. & S. 276.

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entertained that the pauper gained a settlement. If then, the feed of two cows constitutes a tenement, what is there to distinguish that case from the going of thirty sheep, which is expressly found to be worth 16*l.* a-year? Here the residence is in a cottage of the master, but that is a sufficient "coming to settle," within the meaning of the statute 13 & 14 *Car. 2. c. 12*, if there be no doubt that the going of the sheep constitutes a tenement worth 10*l.* He referred to *Rex v. Sutton St. Edmunds*(a), *Rex v. Cherry Willingham*(b), *Rex v. Tolpuddle*(c), *Rex v. Whixley*(d), *Rex v. Piddle Trenthide*(e), *Rex v. Houghton-le-Spring*(f), and *Rex v. Melkridge*(g).

BAYLEY, J.—This case certainly comes very near *Rex v. Minster*, but being distinguishable in one respect, it cannot be a decisive authority in favor of this settlement. But I also think that case is open to some observations, which would prevent me from abiding by it, supposing this to be exactly similar. In *Rex v. Minster* it was to a degree conceded, that the right to have the cows fed on the master's land, constituted a tenement; but the principal question raised was, whether payment of rent by service was equivalent to payment in money. After that, (which was the first case in which it was decided that the right which a servant acquired of having cattle fed on his master's land gave him a settlement, the case of *Rex v. Oswald Twissell*(h), was brought before the Court. There, the pauper rented, among other things, the milk of a cow to be kept by the owner; her keep made up the necessary value of 10*l.*, and she was in fact pasture fed; but the Court said, that as it did not appear to have been made

(a) Ante, vol. i. 424.

(b) Ante, vol. i. 472.

(c) 4 T. R. 671.

(d) 1 T. R. 137.

(e) 3 T. R. 772.

(f) 1 East, 247.

(g) 1 T. R. 598.

(h) Decided in 1818, but not reported.

matter of bargain, that she should be *pasture fed*, hiring her milk was not necessarily taking a tenement, and the order of Sessions allowing the settlement was quashed. The Court in that case held, that it was not sufficient to show that the cows were in point of fact pasture fed, but it was necessary to prove that it was part of the original bargain. Now in this case the stipulation was, that the pauper was to have a house and garden rent-free, but that was connected with the service, and therefore, according to the decision in *Rex v. Minster*, must be left out of the question. Then he was to have the going of thirty sheep with his master's flock as wages; but there was no stipulation how they were to be fed. It is very probable that they would be fed upon the pasture or other growing produce of the land, to the value of more than 10*l.* a-year, but it constituted no part of the bargain that they were to be fed in that manner, and therefore, I think, *Rex v. Oswald Twissell* establishes a distinction between this case and *Rex v. Minster*, which must govern our decision. The case of *Rex v. Minster* again came under consideration in *Rex v. Sutton St. Edmunds*(a), and the Court acted on the principle established in *Rex v. Oswald Twissell*. But I think if it were not for the distinction thus pointed out, there are some observations to which *Rex v. Minster* is open, which (without regard to any doubt as to the value of the pasture feeding, or whether it was a part of the original bargain that the sheep should be fed upon the growing produce of the land,) satisfy my mind that it ought not to be acknowledged as an authority on this occasion. That there is great refinement in all these distinctions there is no doubt; and it could never enter into the mind of any man but that of an extremely acute lawyer, that a person could be considered as *renting a tenement*, by any bargain which, in the character of *ser-*

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(a) Ante, vol. i. 424.



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vant, he might make with his master. In order to gain a settlement, by renting a tenement, I take it to be perfectly clear, that the party must not merely rent a tenement, but he must "come to settle," according to the words of 13 & 14 Car. 2. c. 12. If a person comes to settle on a tenement, we are naturally to look to the nature and character of his residence. In all the cases decided on the statute of Car. 2, the residence of the party has been upon something which may be connected with, and constitutes part of the tenement, in respect of which he gains a settlement by residence. The question is, does he "come to settle?" There are many instances in which a man is allowed to reside in a house, from motives of kindness, rent-free, and in such cases the house is considered part of his tenement, and if the house alone be worth 10*l.* a-year, he thereby acquires a settlement. But at present I am not aware of any case in which the point has been raised and decided, that the occupier of land will acquire a settlement where he does not also reside, in such a way as to constitute what I shall presently point out to be my notion of residence. The case of *Rex v. Houghton-le-Spring(a)*, which has been referred to, was not decided upon this statute. There the pauper lived in the parish in which he was the owner of the property, and the decision was, that he could not be removed from his own, but that was on the principle of the common law, by which every man has a right to continue on his own property. The only case which I am aware of, which appears to hold a different doctrine, is *Rex v. Melkridge(b)*, in which the residence was in a toll-house. There the pauper occupied land in the parish in which the toll-house was situated, and though his residence in the toll-house could not be taken into consideration alone, so as to confer a settlement, still it was considered as a

(a) 1 East, 247.

(b) 1 T. R. 598.

residence connected with the property which he held in the same parish, not in the character of servant, but as if he had a residence of his own. That case was decided on the principle, that it was his own residence, and that he came to settle and reside in his own domicile. Now here the pauper has only a residence in the character of servant. It is true he has the house rent-free, but his occupation is in the character of servant; the house, during the whole time of his continuance in it, was his master's, and it was no more than if he had been allowed to reside in a room in his master's house. Living in one of the rooms of the master's house, is not "coming to settle," nor can it be considered as contributing to what is essential in order to gain the party a settlement. For these reasons therefore, first, on the ground that it does not appear in this case, that it was part of the bargain, that the sheep in question should be fed with growing produce; and second, on the ground that this pauper had not within this parish any thing which properly could be called a residence of his own, and for that reason could not be considered "coming to settle," I am of opinion that the settlement was not gained in *Ixworth*, and that the Sessions did right in quashing the order.

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BEST, J.(a)—In *Rex v. Minster*, the material point was conceded in argument. The Court in that case were clearly of opinion, that the residence in the master's house was not sufficient; and I confess I am at a loss to understand how that residence, connected as it was with the service, could be considered as residing on a tenement within the meaning of the statute. The authority of that case has been broken in upon by *Rex v. Oswald Twissell*, and where there is a clashing of decisions, the proper course is to decide according to the language of the sta-

(a) *Holroyd, J.*, was absent, at the Old Bailey.

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tute. Occupying a tenement, merely in the character of servant, is clearly not such a "coming to settle" as the Legislature contemplated. Coming to settle on a tenement, means, coming in the character of tenant, as the very words of the statute import, and not in the character of servant. The language of *Le Blanc, J.* in *Rex v. Minster*, is decisive upon this point. He is of opinion that the residence in the house is not sufficient. Why? Because the servant has not an absolute right of possession in the house; it may be put an end to at the pleasure of the master. Granting that the feeding of the sheep in this case constitutes a tenement, still the same vice attends that point. This pauper does not come to settle as a tenant. He takes the feeding of the sheep in the same character as the house, namely, as a servant, and therefore he cannot be considered as renting a tenement within the meaning of the statute. The taking must be in the man's own right; but the right here is that of the master, who has the power of putting an end to the possession by determining the service. I agree that the party must come to reside on part of the tenement. These are the express words of the statute; "settle in any tenement." Now in *Rex v. Knighton(a)*, the Court only decided that the party must reside either upon the tenement, or at least in the parish in which the tenement is situated. Hiring a tenement in a parish without residing, is not sufficient; the pauper must "settle" on the tenement, or he must be resident on that which may be considered part of the tenement. According to the opinion of *Le Blanc, J.*, to which I have already referred, residing merely in the character of servant, is not to be considered as a residence upon the tenement in respect of which the settlement is to be gained. But without referring to cases, I am of opinion that this pauper was not coming permanently to

(a) 2 Bott, 211.

settle in a tenement of his own, within the spirit and letter of the statute, and therefore did not acquire a settlement in this parish.

Order of Sessions confirmed.

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The KING v. The INHABITANTS of ALTHORNE.

ON appeal against an order of two Justices, by which *John Wiggins* and *Elizabeth* his wife were removed from *Mayland* to *Althorne*, both in the county of *Essex*, the Sessions confirmed the order, subject to the opinion of this Court, on the following case:—

The pauper, at *Michaelmas*, 1821, agreed with *Mr. Croil*, a farmer in the parish of *Mayland*, to live with him as his servant in husbandry, from that *Michaelmas* till the *Michaelmas* following, at ten shillings *per week*, for the Winter half year, and eleven shillings *per week*, for the Summer half year; the pauper to have a month in harvest to himself, and if he and his master could not agree for the harvest month, the pauper was to harvest where he pleased. If any one offered the pauper more money than his master for the harvest month, the pauper had a right to go. At the commencement of the harvest, the master offered the pauper 5*l.* for the harvest, which the pauper at first refused, and required 5*l.* 5*s.*, but afterwards agreed to take the 5*l.*, and accordingly continued in his master's service during the whole year, and received his wages weekly.

A labourer in husbandry hired himself from *Michaelmas* to *Michaelmas* at weekly wages, and by the terms of the contract he was to have a month in harvest to himself, and if he and his master could not agree for the harvest month, he was to harvest where he pleased. At the commencement of the harvest he agreed with his master to work on the terms then offered, and continued in the service during the whole year:—Held, that this was an exceptive, and not a conditional hiring, and therefore no settlement was gained by service under it.

Jessopp and *Walford*, in support of the order of Sessions, contended, that the reservation in the agreement by which the pauper was to have a month in the harvest to

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himself, rendered it an exceptive hiring, and therefore this could not be considered as a hiring for a year, so as to confer a settlement. They relied upon *Rex v. Bishop's Hatfield*(a), as an express authority, and cited 1 Nol. P. L. 338, and *Rex v. Arlington*(b).

*Brodrick*, contra. This was a conditional and not an exceptive hiring, and therefore as the pauper actually served for a whole year under it, he thereby gained a settlement in *Mayland*. There is no doubt that if this was an absolute contract, that the pauper was to have the harvest month to himself, it would be an exceptive hiring, which was the case in *Rex v. Bishop's Hatfield*; but this being merely a conditional hiring, the pauper gained a settlement by the year's actual service. In *Rex v. Bishop's Hatfield*, the pauper actually hired himself to another master during the harvest, which makes all the difference. He cited *Rex v. North Nibley* (c), *Rex v. New Windsor* (d), and *Rex v. St. Ebbs* (e).

BAYLEY, J.—I am of opinion that the Sessions ~~have~~ rightly decided this case. They were of opinion that ~~this~~ was not a conditional but an exceptive hiring. There may be nice distinctions between decided cases, but I think the distinction between a conditional and an exceptive hiring is broad and intelligible. I take a conditional hiring to be, that, where the parties stipulate for the continuance of the service for a whole year, but by fixing the terms upon which the service is to be continued, it is left to the option of either to put an end to the contract. If the bargain is made so that it shall be co-extensive with the whole year, but with liberty to either to dissolve it,

(a) Burr. S. C. 439.

(b) 1 M. & S. 622.

(c) 5 T. R. 21.

(d) Burr. S. C. 19.

(e) Id. 289.

then it is a conditional hiring; but if the servant stipulates, that during a period of the year he shall be absent from labour, or that with respect to a particular period of the year there shall be a new bargain when the period arrives, then it is an exceptive hiring, and no settlement can be gained. In this case there is an express stipulation that the pauper shall have a month to himself in the harvest time, and if he and the master could not then agree for the harvest month, he was to harvest where he pleased. The parties, therefore, do not bargain beforehand as to the wages to be paid during the harvest month, but that is to be subsequent matter of contract. This is no more therefore than a hiring for eleven months, the twelfth month being scooped out of the original contract, and subject to a new bargain. I am of opinion that it was no more than an exceptive hiring, and that the service under it confers no settlement.

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BEST, J. (a).—I am of the same opinion. I think *Rex v. Bishop's Hatfield* is an authority in point, and though the pauper in that case hired himself to another master during the harvest, that makes no difference.

Order of Sessions confirmed.

(a) Holroyd, J., was absent, at the Old Bailey.

### The KING v. The JUSTICES of CUMBERLAND.

**MOTION** for a certiorari to remove into this Court an order of the *Cumberland Quarter Sessions*, disallowing  
 A Private Inclosure Act contained a clause, enacting, "that no item or charge in the accounts of the Commissioners should be binding to the parties or valid in law, unless the same should have been duly allowed by a Justice of Peace for the county," in the manner therein mentioned, does not deprive a party aggrieved of the right to appeal, given in another clause, against "any thing done in pursuance of that or the General Inclosure Act (other than, and except, such determinations as were by that or the General Inclosure Act, declared to be binding, final, and conclusive), the allowance by a single Justice being a ministerial act, not falling within the exception.

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certain items in the accounts of Commissioners under a Private Inclosure Act [For inclosing Lands in the Parish of *Gosforth*, in the County of *Cumberland*], for the purpose of having the same quashed. The act in question (50 Geo. 3.) after reciting the General Inclosure Act, 41 Geo. 3. c. 109, enacted, "that once at least in every year, during the execution of this act (such year to be computed from the day of the passing the same) the Commissioners shall and they are hereby required to make a true and just statement or account of all monies by them received and expended, or due to them for their own trouble and expenses in the execution of this, or the said recited act, and such statement and account, when so made, together with the vouchers relating thereto, shall be by them laid before one of his Majesty's Justices of the Peace for the said county of *Cumberland* (not interested in the said division and inclosure), to be by him examined and balanced; and such balance shall be by such Justice stated in the book of accounts to be kept in the office of the clerk of the Commissioners; and no charge or item in such accounts shall be binding to the parties concerned or valid in law, unless the same shall have been duly allowed by such Justice." By another clause it was enacted, that "if any person shall think himself aggrieved by any thing done in pursuance of this act, or the recited act (other than, and except, such determinations as are by this or the said recited act declared to be binding, final, and conclusive; and except also in such cases as by this act are authorised to be tried by a jury) he may appeal to the General Quarter Sessions of the Peace, &c. It appeared, that in pursuance of the clause first above-mentioned, the Commissioners, on the 18th *May*, 1822, made out a statement and account of monies expended by them in the execution of the act, and laid it, together with all necessary vouchers, before a

Justice of the Peace for the county of *Cumberland* (not being interested in the inclosure) by whom it was examined, balanced, and allowed. Certain persons interested in the inclosure, appealed against the allowance at the *Midsummer* Sessions following, when it was objected on the part of the Commissioners, that the Sessions had no jurisdiction, but the Court over-ruled the objection, and after hearing the appeal, made an order, whereby they disallowed several items allowed by the single Justice.

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*Copley*, S. G. in support of the motion for a certiorari, contended, that the order of Sessions ought not to have been made, inasmuch as the Justices there assembled had no authority to make it. It is true, that the clause relating to the accounts of the Commissioners, does not in terms, state that they are to be binding and conclusive when balanced and allowed in the manner therein pointed out, but that is the necessary inference. To say that the accounts shall not be binding until allowed, is virtually saying, that when allowed, they shall be binding. Again, the clause which gives an appeal in certain cases, excepts the determinations which are by this act and the General Inclosure Act, declared to be final, binding, and conclusive; but throughout the whole of this act, there is no clause to which that exception can be applicable, unless it applies to the allowance of the accounts by a single Justice. In *Rex v. The Commissioners of Dean Inclosure*(a), this was the view taken of a similar point by Lord *Ellenborough*. By this act the single Justice is to settle and balance the accounts; and according to *Boyfield v. Porter* (b), his decision is final and conclusive.

PER CURIAM.—We cannot, by mere inference, exclude the operation of the appeal clause found in this act.

(a) 2 M. &amp; S. 8.

(b) 13 East, 200.



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The act contains no positive declaration that the allowance of the Commissioners accounts by *a single Justice*, shall be final and conclusive. The words "binding, final, and conclusive" in the exceptive part of the appeal clause, must necessarily be confined to those proceedings which are made binding, final, and conclusive by some affirmative enactment in this statute. No such enactment is to be found relative to the subject in question. The whole of the argument in support of the rule, is founded on mere inference. The utmost effect that can be given to the words "no charge or item in such accounts shall be binding to the parties concerned, or valid in law, unless the same shall have been duly allowed," is, to say, that the allowance of the accounts in the mode pointed out, shall be binding, *if not appealed from*. In this case the allowance of the accounts by a single Justice, is not to be considered as a judicial decision, and therefore the case of *Boyfield v. Porter* is wholly inapplicable. The *Dean inclosure* case is also inapplicable, because in that the enactment was, that "the Commissioners should order and finally direct" as to the matter in dispute; whereas, here, the act says, "that no account shall be binding or valid unless allowed," which words cannot have the same effect as the expression in that case. We are therefore of opinion, that the appeal was not taken away in this case, and the Justices at Sessions having jurisdiction, did right in hearing the appeal(a).

Rule refused(b).

(a) Bayley, J., was absent.

(b) Vide *Rex v. The Justices of*

*the West Riding of Yorkshire*, ante, p. 10.

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The KING v. BISHOP, Esq.

**R**ULE nisi for an information having been obtained against the defendant for alleged corrupt practices as a Justice of the Peace, cause was shewn against it, on the ground that the application came too late, inasmuch as the latest act of misconduct imputed, took place more than twelve months before the present application, and the cases of *Rex v. Marshall*(a), and *Rex v. Harries*(b), were cited. In answer to this, it was urged, in support of the rule, that the prosecutor had no knowledge of the facts until a very short time before the application to this Court, when a meeting of the Magistrates having taken place, for the purpose of investigating the defendant's conduct, the prosecutor and another Magistrate being dissatisfied with his explanation, applied for the information. This, it was urged, was a sufficient excuse for the delay, and took the case out of the general rule.

The Court refused an information against a Justice of the Peace, for alleged misconduct in his office, where it appeared that the supposed criminal acts took place more than a year before the application, although the prosecutor swore that the circumstances did not come within his knowledge until just before the motion.

**PER CURIAM.**—We think the application comes too late. In discharging this rule, however, we do not prevent the party from proceeding by indictment. But if we were to allow the lateness of the knowledge of the supposed criminality to be an excuse for not applying to the Court sooner, we should entirely defeat the very useful rule laid down in the cases referred to. Possibly the case might be different, if all the Magistrates had concurred in directing the application, but that is not so, and therefore the rule must be discharged.

The objection was afterwards waived, and upon the merits of the case, the Court

Discharged the rule, with costs.

*Scarlett* and *W. E. Taunton* were for the prosecution; and *Campbell* and *Russell* for the defendant.

(a) 13 East, 322.

(b) 6 East, 270.

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## The KING v. WILLIAM MEAD and ROBERT BELT.

*Certiorari* refused to remove an indictment of murder from *Yorkshire*, in order to a trial at bar, or in another county, on the ground that the prisoners (who had pleaded to the indictment), could not have a fair and impartial trial in the former county.

THESE persons were indicted of murder, at the last *Spring Assizes* for the county of *York*, before *Holroyd, J.*, and after a plea of *Not Guilty*, and issue thereon, a motion was made to postpone the trial until the following *Assizes*, on the ground that certain statements had appeared in different newspapers, tending to excite a prejudice against the prisoners, and prevent them having a fair and impartial trial. The trial was accordingly postponed, and on a former day in this Term, *J. Williams* obtained a rule nisi, for a *certiorari*, to remove the proceedings into this Court, in order to a trial either at bar, or in some other county than *Yorkshire*, on the ground that the prisoners could not have a fair and impartial trial in the latter county. The affidavits in support of the motion, disclosed circumstances from which the Court might be induced to think that the prisoners could not have an impartial trial in the county of *York*. Informatory and exaggerated statements respecting the supposed conduct of the prisoners, had appeared in the county papers, and printed hand bills, containing matter of the like tendency had been circulated in, and in the neighbourhood of *Scarborough*, where the prisoners had resided, and also in different parts of the *East and West Ridings* of the county of *York*, but it appeared that all these publications had taken place before and during the last *Assizes*, and none were alleged to have been published since that time.

*D. F. Jones* now shewed cause against the rule, and submitted, that the Court had no authority to remove an indictment under the circumstances of this case. He

could find no precedent of a *certiorari* granted to remove an indictment of felony from one county to another after plea and issue. He admitted, that in cases of misdemeanor, the practice of removing by *certiorari*, in fit and proper cases, had obtained, *Rex v. Hunt(a)*, and also that there were instances of removal by *certiorari* of indictments for felony from Courts of Quarter Sessions and local jurisdictions, *Rex v. Thomas(b)*. There were several objections to the present motion, independently of its novelty, which would induce the Court to hesitate before they granted it, even supposing they had authority so to do. In the first place, the case was at issue in the county of York, and the witnesses for the prosecution were bound over to give their evidence in that county. But supposing the Court should award a trial at bar, the prisoners could derive very little advantage from it, because, still the case must be tried by a Jury of the freeholders of York. The recognizances of the witnesses could not compel them to attend in this Court, or in any county other than Yorkshire, and this Court had no power to bind them over in fresh recognizances. But independently of this difficulty, the expenses of the prosecution could only be awarded by the Justices of Assize in the county in which the prisoners are tried, 58 Geo. 3. c. 70; and therefore if the trial was had at bar, this Court had no power to grant expenses, which would subject the prosecutors to great hardship. But considering this as an application to the discretion of the Court, without regard to the strict rules of law, still the Court ought not to act upon it, unless it appeared that the persons connected with the prosecution, were privy to the publication, which it was said would tend to prejudice the prisoners on their trial. No imputation of that kind was suggested. Be-

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(a) 3 B. &amp; A. 444.

(b) 4 M. &amp; S. 442. See the cases there cited.

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side this, the present application came too late. This motion might have been made in *Easter*, but it was not presented to the notice of the Court until the close of *Trinity Term*. It was further to be observed, that no publication of the nature complained of, had taken place since the last Assizes, and therefore there was every reason to suppose that the public excitement alluded to had subsided. Another objection, which seemed insuperable, was, that the prisoners had been arraigned, and had put themselves on the country in the county of *York*. The prisoners, therefore, could not be tried in another county upon that arraignment, and if they were brought up by *habeas corpus*, to be arraigned a second time, which was necessary to a trial in any other county, it would be error on the record. This, therefore, was an attempt to delay justice without sufficient ground. At all events the *venue* could not be changed until the prisoners were arraigned a second time, and it was a matter of considerable doubt, whether the *venue* could be changed out of Term.

*J. Williams* and *Archbold*, contra, insisted, that there was no doubt whatever of the power of the Court to grant a *certiorari* for the removal of an indictment for felony, in order to a trial at bar. For this they cited *Bac. Abr. tit. Certiorari*, 4 *Vin. Abr.* 345. 356. *Rex v. Wells* (a), *Rex v. Elford* (b), *Tyndal's case* (c), *Rutabie's case* (d), *Rex v. Althoes* (e), *Rex v. Thomas* (f), *Rex v. Thompson* (g). There was no doubt that this Court had power to grant a *certiorari* to Courts of Oyer and Terminer. *Fitzherbert N. B.* 246. A. B. H. *Rex v. Sidney* (h), *Rex v. Morgan* (i), and *Rex v. Wells* (k). The only

(a) 1 *Stra.* 549.(b) 2 *Stra.* 877.(c) *Cro. Car.* 252. 264. and 291.(d) 2 *Hale*, 212.(e) 3 *Mod.* 135.(f) 4 *M. & S.* 442.(g) 21 *Vin. Abr.* 177.(h) 2 *Stra.* 1165.(i) *Id.* 1049.(k) 1 *Stra.* 549.

question therefore was, whether, under the circumstances of this case, the Court would interpose with a view to the due administration of justice. It was clear that if an impartial trial cannot be had in the proper county, it is ground for a *certiorari*. *Rex v. Fawle(a)*, *Rex v. Thomas*, and *Rex v. Hunt*. In the present case, publications of a most inflammatory description had been circulated throughout the county of York; great prejudice had been excited against the prisoners, and they distinctly swore to their information and belief, that they could not, in consequence of these publications, have a fair and impartial trial in that county. The objections suggested on the other side could not prevail against this motion. There was no doubt that the prisoners might plead over again in this Court, although the *certiorari* would only remove the indictment, and as to the witnesses, there was nothing to prevent this Court from binding them over again to appear at the trial, in the place which the Court should direct. It was a sufficient ground for this Court to interfere, if the prisoners had not even a probable chance of a fair and impartial trial, but under the circumstances of this case, it seemed almost impossible that the ends of public justice could be satisfactorily attained in the county of York.

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ABBOTT, C. J.—The Court is placed in a situation of great difficulty. On the one hand, if we do not grant the writ, there is a possibility that those who shall be assembled as Jurors on the trial of these prisoners, may, through the great and grievous misconduct of the person who has sent forth these publications to the world, come to the discharge of their duty with minds not entirely un-

(a) 2 Ld. Raym. 1452. See *v. Bennett*, 2 Stra. 874, and *Rex v. Webb*, 2 Stra. 1068. *Rex v. Amery*, 1 T. R. 363.  
*v. Harris*, 3 Burr. 1330. *Poole*

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biased. On the other hand, if we should grant the writ, one effect of it must be, delay in the administration of justice. Another probable consequence of it will be, if a trial is granted in another county, or at the bar of this Court, that those who have instituted this prosecution, will, through want of means, be obliged to abandon it. The difference in the expense of a trial taking place under a writ of *certiorari*, and a trial at the next assizes for the county of York, must be very great, beside the difficulty of obtaining witnesses and carrying them down to another county. This is the state of things on the one hand and on the other. In considering these circumstances, we must not forget that the prisoners might have applied to us at a much earlier period. It was in their power to do so, and I think the application might have been made with much more reasonable probability of success at the commencement of *Easter*, than so late in this Term. These publications will have occurred at a period of five months before this trial can take place in the county of York; and therefore we think our best and most discreet course is, not to grant the writ, but to rely upon the confident hope, that those persons who shall be assembled in the county of York for the discharge of their duty as Jurors, will take care to prevent these improper publications from having any weight on their minds. I think we may confidently hope, that in a serious case of this kind, the Jury will guard themselves against acting upon preconceived impressions.

The other Judges concurred.

Rule discharged.

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## The KING v. THOMAS DOLBY.

**T**HIS was an indictment for a libel. The case came on to be tried before *Abbott*, C. J., and a Special Jury, at the *Middlesex* adjourned Sittings after *Michaelmas* Term, 1821. When the Special Jury panel was called over, two only of the Special Jurors were in attendance. The counsel for the Crown then prayed a *tales*; upon which the defendant put in a challenge to the array of talesmen, for unindifferency in one of the sheriffs of *Middlesex*, on the ground that, at the time of forming the *tales* panel, he was one of the prosecutors of the indictment. The counsel for the prosecution immediately took issue upon the challenge, and thereupon the Court appointed the two Special Jurymen who appeared, as triers, and they having found the sheriff unindifferent, the panel was quashed, and the cause was struck out of the paper. In *Hilary* Term, 1822, a rule was obtained for directing new Jury-process to the coroners of the county of *Middlesex*(a), which was accordingly done, and the cause was again set down for trial on the 26th *February* last. On that occasion, several persons who had been summoned by the coroner, attended to form a panel *de circumstantibus*, and the case having been called on, and only two Special Jurymen having appeared, the prosecutor prayed a *tales*. The defendant's counsel objected, that there ought to have been a writ of *octo* or *decem tales*, but that objection was over-ruled, and the learned Judge commanded the coroners to summon *instantly*, such of the bye-standers as they thought proper, to form a *tales de circumstantibus*. But as one of the coroners only was present, the defendant's counsel objected that this could not

After a *tales* panel, on an indictment for libel (appointed to be tried by a Special Jury), had been quashed for unindifferency in the sheriff: Held, that a *venire facias juratores* might be awarded to the coroners, though two of the Special Jurors summons had attended on the former occasion.

Upon the prayer and award of a *tales de circumstantibus* at Nisi Prius, it is not compulsory on the coroner or sheriff to select the talesmen from among the bye-standers accidentally in Court; they may be selected out of persons previously appointed by the coroner or sheriff, to be in attendance, in the expectation that a *tales* would become necessary.

(a) Ante, vol. i. 49.



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be done, because, as the Jury-process was directed to both the coroners, the return could only be made by both, and the learned Judge being of opinion that this was a fatal objection, the case was again made a *remaneat*. The cause came on a third time for trial at the adjourned Sittings after last *Trinity* Term, when six Special Jurymen having appeared, among whom were the two who originally attended, a *tales* was again prayed, but the defendant's counsel objected to the coroners return, upon the ground, that as two Special Jurymen had appeared when the cause first came on for trial, the coroners should have summoned others to have made their number complete, instead of summoning an entire Jury *de novo*. It was also objected, that the *tales* had been improperly returned, inasmuch as they had been summoned by the coroners, by letter, to attend, whereas they ought to have been indiscriminately selected *de circumstantibus* according to the statute 35 *Hen. 8. c. 6*. These *tales* were, in fact, taken from the ordinary Common Jury panel, from which talesmen are usually called. The learned Judge, however, over-ruled both objections; the trial proceeded, and the defendant was found guilty.

*Scarlett*, in *Michaelmas* Term last, obtained a rule nisi, for a new trial, upon three grounds. First, that the talesmen had been previously summoned by the coroners by letter, instead of being taken from among those who were accidentally present; second, that the whole Special Jury had been summoned by the coroners, whereas a writ of *decem tales* ought to have been awarded; and, third, that there were two *venires* upon the record, which rendered the proceeding irregular.

*Gurney* and *Tindal*, on a former day in this Term, shewed cause. To support the first objection, it must

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be shewn; that the coroner has no power to summon individuals to attend in Court, for the purposes of the administration of justice, and that the *tales* in this case ought to have been, and in every case by law must be, persons accidentally and unpremeditatedly present. This position, however, cannot be maintained, either by *dicta* or by precedents, and will be found, upon examination, to embrace a most inconsistent and dangerous doctrine. How is it possible for the coroner to know the character of persons who might thus attend, the motives which brought them thither, or their connexion with the parties in the cause? If Jurors were to be indiscriminately chosen, every defendant would have it in his power to poison the fountain of justice, because he might induce such persons to be present as were his own friends and partizans, and who would come resolved to find a verdict of Not Guilty, whatever might be the evidence before them. It may be said, that the power to summon the Jurors, is a dangerous power in the hands of the coroner, and that it includes within itself the liability to act corruptly. Such a position is absurd and unjust. Every public officer, whatever may be the nature of his office, must be deemed pure until the contrary is shewn, and the Court always does, and in common fairness must, assume that he discharges his duty with honesty and impartiality. It is not pretended that, the *tales* in this case were in any respect personally objectionable, nor that any corrupt or improper conduct had been employed in their selection; and therefore, in the absence of evidence to that effect, the Court will presume, that every thing has been done fairly. If the coroner, in this instance, has offended at all, he has been guilty of that which is mentioned in many of the old writers as an offence, namely, embracery. But in order to convict a party of that offence, he must be proved to have acted from a corrupt and criminal

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motive. *Bac. Abr. tit. Juries, Judgment in Attaint* (3), and the authorities there collected. In this case, therefore, it is clear that the coroner cannot be charged with embracery, for he was perfectly disinterested, was acting merely *virtute officii*, in obedience to a Rule of Court, and perfectly free even from any suspicion. If he is not guilty of embracery, he is guilty of no offence; he has simply performed his duty in guarding against the possible emergency of a deficiency in the Jury, and thereby to prevent any impediment in the administration of justice. Then the second objection will be found equally unsupported. It is, that entirely new Jury-process was awarded, instead of issuing a writ of *decem tales*, in order to add them to the two Jurors who appeared on the former trial. But it is quite clear that the coroner has pursued the only course open to him since the statute 3 Geo. 2. c. 25. At common law neither Special Juries nor *tales de circumstantibus* existed. Before that statute, the process was a *venire habeas corpus* and *distringas*, and if a *tales* was awarded, the *habeas corpus* or the *distringas* was re-issued, with an order to add to those previously summoned by the *venire octo decem*, or other *tales*, as the case might be. The 35 Henry 8. c. 6. s. 5, gave the *tales de circumstantibus* in civil actions only, which, however, the 4 & 5 P. & M. c. 7, extended to prosecutions at *Nisi Prius*. Then the 7 & 8 Will. 3. c. 22. s. 3, (which was an Act for the Ease of Jurors) provided that the sheriff should return for talesmen, such persons as shall be returned upon another panel, to serve as Jurors at the same assize. And lastly, the 3 Geo. 2. c. 25, directed the same panel to be annexed to every *venire*, and declares, in section 15, that the Jury struck by the parties shall be the Jury to try the cause. It has been decided, on that clause, that if, after a Special Jury has been struck, the cause goes off for want of Jurors, no new Jury can

be struck, but the cause must be tried by the Jury first appointed. *Rex v. Perry* (a). Now, if a writ of *decem tales* had been awarded in this case, it would have been impossible to comply with the requisites of the statute, and the case just cited is a direct authority to shew, that such a mode of proceeding would have been irregular. In point of fact, the same two Special Jurors who attended on the former trial, attended also at the latter, so that the persons added to them, were precisely the same persons as would have served if the writ of *decem tales* had been awarded. If this objection could prevail, it would go to annihilate the whole system of Special Juries. At common law there is no Special Jury, nor are there any *tales de circumstantibus*; the statute of 3 Geo. 2, gave the Special Jury, but it did not admit of the writ of *decem tales*, and therefore the only mode of making up a deficient Special Jury, is by supplying others from the panel of Common Jurors. Indeed, by the very provisions of the statute, that mode becomes necessary, because, as the Special Jury first struck, must be the Jury to try the issue, if an imperfect Jury appears, and the case goes off, to make it up from an *ecto* or *decem tales*, would be to constitute another, and not the same Jury, and would be to violate the express provision of the statute. But the defendant has no reason to complain of the adoption of this course in the present case, because he has, by his own conduct, rendered it necessary. He has suggested the fact of the unindifferency of the sheriff; that suggestion appears upon the record, and is acquiesced in by him as a fact, and upon that is founded an award of process to the coroners. There is, therefore, no ground for objecting either to the Jury themselves, or to the mode in which they have been chosen, and as they have properly tried the cause, and regularly found their verdict,

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(a) 5 T. R. 453.

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there is no pretence for this objection. Then, thirdly, there is no case which goes the length of proving that there may not be two *venires* on the record. In *Symonds v. Walsh*(a), the judgment, indeed, was reversed, but only upon the ground that the *venire* was awarded to the wrong person; and in *Pretious v. Robinson*(b), the Jury was chosen from two different panels, which were returned to the two *venires*, and there was no reason assigned for the issuing of the second *venire*. But it has been more than once held, that where the sheriff is unindifferent, a second *venire* may be issued, *Rex v. The City of Worcester*(c), and *Willoughby v. Egerton*(d), and therefore as there is a suggestion here, which is not denied, that the sheriff was unindifferent, the second *venire* was properly issued to the coroners, and the whole course of proceedings has been perfectly correct. There is, therefore, no ground for the present application.

*Scarlett* and *J. Evans*, in support of the rule. The principle upon which the objections to the Jury-process in this case are founded, has been hitherto wholly overlooked. It is this; that as it has been decided that the defendant cannot challenge the array of a Special Jury, *Rex v. Edmonds*(e), the return of the *tales*, in making up a Special Jury, must be regulated according to the provisions of the statute which first gave the Special Jury itself; which has not been done in the present instance. The objection taken at the first trial, therefore was, not to the Special Jurymen, but to the *tales*, returned by the sheriff, and consequently there would be no fresh award except with reference to the *tales*. If both the coroners had been present in Court when that objection was taken, the

(a) Cro. Jac. 547.

(b) 2 Vent. 173.

(c) Skin. 105.

(d) Cro. Jac. 35.

(e) 4 Barn. &amp; Ald. 471.

Judge might, under the statute 35 Henry 8. c. 6, have ordered them to return *instantly* a panel of *tales de circumstantibus*, to supply the deficiency of that particular Jury, but no fresh Jury would then have been summoned, and no new process awarded. But only one coroner being present, the cause necessarily went off, and new process became necessary, but that could properly authorize no more to be done than would have been done in Court, if both the coroners had been present. It is admitted, that by 3 Geo. 2, the Jury first struck must be the Jury to try the cause, and therefore an award of a venire to summon a second Jury was clearly a violation of the statute. [Bayley, J. That would be ground of error, if it was an objection at all; it cannot be urged, in support of the present motion.] It cannot be ground of error in the present case, because the Special Jury-process does not appear upon the record; but it is equally an irregularity, because the award to the coroner is in general terms "to cause to come twelve good and lawful men," which is inconsistent with the principle which characterizes the selection of a Special Jury. If the original objection had been to the Jury *in toto*, the proceeding which has been adopted might have been correct; but the objection was to the *tales* only, and therefore the common-law process was the only course left open to the coroner. But this process was altogether irregular, because the effect of it was to put two *venires* upon the same record; upon one of which something has been done. It is quite clear, that where any thing has been done upon one *venire*, and has not been objected to, that process must be amended and made complete, and another cannot be awarded; for the two *venires* cannot exist upon one record. *Pretious v. Robinson*(a), *Willoughby v. Egerton*(b), *Pigot v. Pigot*(c), *Symonds v. Walsh*(d), and

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(a) 2 Vent. 173.

(b) Cro. Eliz. 853.

(c) Cro. Car. 551.

(d) Cro. Jac. 547.

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*Rex v. Franklin*(a). The remaining objection is still stronger, and more general in its application, namely, that the coroner, in taking upon himself to summon the Jury, has assumed a right which the law has vested in the parties to the cause themselves, and which in his hands may be abused. The Court will, it is true, presume him to have done right, until the contrary is shown, but this is no answer to the objection. Upon such a subject every thing is to be presumed in favor of the defendant, and against the officer, because the latter has at least the power to do wrong, and the former is deprived of all control or restraint over him. The Legislature have shewn that they would presume that a Jury might be packed, and therefore it was that they passed the statute, giving the *tales de circumstantibus*. 2 Hawk. P. C. lib. 2. c. 41. ss. 20, 21. The object of the law has always been to prevent the possibility of partiality, or any thing approaching to a selection by the officer. Here the coroner not only returns a Special Jury in the first instance, but also a number of persons whom he has chosen to serve as *tales*. The coroner had no right to presume, that a sufficient number of Special Jurors would not attend. The most dangerous consequence might ensue, if he were allowed to act on that principle. Possibly the very persons whom the defendant has previously challenged, might be selected by the coroner as *tales*, and might be the very men to try his cause. [Bayley, J. This argument is merely saying, that every public officer *may* abuse his authority.] It is shewing *how* he may, and the possibility of abuse is enough to support the objection(b). Even at common law none could be summoned on the *tales* without affording to the party accused the opportunity of

(a) 5 T. R. 454.

Abr. Trial, 669. Vin. Abr. Trial,

(b) Vide Dyer, 367. 5 Co. 305.

Rep. 36 b. Godbolt, 246. Roll.

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knowing before hand who they were; and the 42 *Edw. 3.* c. 11. expressly declares, that the names of the persons who are to serve on the Inquest shall be returned into Court. It has been held, that that statute applies to both civil and criminal cases, 2 *Hawk. P. C. lib. 2. c. 41. s. 21*, and if the coroner has the power of summoning the Jury privately, and of his own mere motion, that statute would be in effect repealed. If the coroner has this power, what is there to prevent the sheriff from exercising it in all criminal cases; because the statute 7 & 8 *Will. 3. c. 32*, applies exclusively to civil cases? A *tales de circumstantibus* means *ex vi termini*, a Jury of persons taken from those who are accidentally present. Neither the sheriff nor the coroner had any power to compel the attendance of persons so selected. If they had such power, the Legislature would have provided some process for that purpose. For these reasons, it is clear, first, that the coroners had no authority to summon previous to the trial a *tales de circumstantibus*; second, that it was illegal to summon a Special Jury *de novo*; and third, that there being two *venires* on the record, the proceedings are altogether irregular, and the defendant is entitled to a new trial.

The COURT took time to consider of the case, and judgment was now delivered by

ABBOTT, C. J.—This was an application for a new trial. Two objections were taken to the proceedings, first, that the award of a *venire facias juratores* to the coroners, after a previous award of the like process to the sheriffs, which had in fact been acted upon, was an irregularity; and, second, that upon the prayer and award of a *tales* at the trial, and under which the cause was in fact tried, the *tales* ought to have been taken out



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of persons accidentally present in Court at the moment, without any previous measures adopted by the coroners to insure the attendance of persons whom they thought proper to constitute the *tales*, if a *tales* should become requisite. The first of these objections was discussed much, upon the supposition that the process directed to the coroners, demanded them to summon other and distinct persons, from those who had originally been summoned by the sheriffs. The language of the record, however, does not justify that position, for the coroners are commanded only "to cause to come twelve good and lawful men;" they are not described as twelve *other* good and lawful men, and this being in fact a Special Jury cause, (although that does not appear upon the record), the original panel returned by the coroners contained, as it ought, the very same names, and no others, as were contained in the panel returned by the sheriffs, being the persons nominated under the Rule of Court, and in conformity with the statute. The whole proceeding, therefore, was in substance and effect, the same as if an *eco* or *decem tales* had been awarded according to the ancient practice, prior to the Acts of Parliament, which gave the *tales* according to the mode now in use. From this it appears, that in point of fact, the cause has been tried by the very principal Jurors by whom, as it is contended for the defendant, it ought to have been tried. We are therefore of opinion, that there is not any sufficient foundation for this objection, either upon or *dehors* the record. As to the second objection, namely, that the coroners should have taken the *tales* from such persons as might happen to be present, and ought not to have summoned any persons of whom they might make a panel, we are also of opinion, that this objection ought not to prevail. At the trial, no objection was taken to the persons who had been summoned, and who appeared, nor

was it suggested that the coroners had, in the particular instance, acted from any improper motive or design. The objection was founded altogether upon general principles, and upon the supposed danger of permitting a sheriff, or a coroner, to secure the attendance of persons nominated by himself, and by those means, in effect, to select a part of the Jury. Now, this objection is evidently contradictory to the whole principle and practice of the common law in this matter. By the common law, the person to whom the Jury-process was directed, whether the sheriff or coroner chose whom he could summon to attend and place on the panel, and if a full Jury did not appear, and an *octo* or *decem tales* was awarded at common law, the sheriff, or coroner, also selected the persons in execution of that process. The common law admits no such absurdity, as the taking by chance and hazard, those persons who are to discharge the solemn and important duties of Jurymen; but has provided that it shall be done by some known and responsible officer, who may be forthcoming, and punishable if he shall act amiss. Even the 35 Hen. 8. c. 6, which gave the *tales de circumstantibus*, as it is usually called, leaves a discretion to be exercised by the officer, and the provision was made, as appears plainly by the language of the fifth section, "for the more speedy trial of issues," and not, as was suggested in argument, for the prevention of partiality. And by section 6, the sheriff, or other minister, is to name and appoint so many of such other able persons of the county as may be present at the said assizes, or Nisi Prius, as shall be sufficient to complete the number of Jurors required. Nomination and appointment necessarily imply selection, and therefore in that case a discretion is left to be exercised by the officer, though the persons out of whom that selection is to be made, are limited of necessity to such as may happen to attend at

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the assizes, or *Nisi Prius*. It was well observed, in argument, on the part of the prosecution, that the course of proceeding adopted by the coroners in this case, is infinitely more free from the probability of an unfair trial, than the taking the *tales* from those who are accidentally present in Court would be; because, in the latter case, either party may take measures to fill the Court at the time of trial, with his own personal friends and partizans. For these reasons we are of opinion, that the rule for a new trial ought to be discharged.

Rule discharged.

The KING v. GEORGE M'GILL.

Exposing to sale, and selling tea as a hawker, without a license, is an offence against 50 G.S. c. 41, and subjects the offender to a penalty of 10*l.*, although by 18 Geo. 3. c. 46. s. 6, it would be an offence for a hawker to sell tea in an unentered place, even if he had a hawker's license.

The agent or servant of an unlicensed hawker, is equally liable with his principal, to a penalty, if he sells without a hawker's license.

**CONVICTION** under 50 Geo. 3. c. 41. s. 17, for selling tea without a hawker's license. The conviction stated, that on, &c., at, &c., the defendant being a hawker and trading person, going to other men's houses, carrying to sell, and exposing to sale, without any license so to do, certain goods, wares, &c. to wit, divers parcels of tea, and that he being such hawker as aforesaid, did, on the day and year aforesaid, at *Worcester*, carry to sell, and expose to sale, certain goods, wares, &c., to wit, divers parcels of tea, and was then and there found trading as aforesaid, without any license so to do, contrary to the form of the statute, &c. The conviction then set forth the evidence, and stated, that the Justice did thereupon convict him of the said offence, and adjudged that he had forfeited the sum of 10*l.* Against this conviction the defendant appealed, and the same was confirmed by the Sessions, subject to the opinion of the Court, upon the following case:—

*George M'Gill*, as the agent of *David Salisbury*, a licensed tea-dealer, on the 17th of *April*, 1822, in the city

of *Worcester*, carried to sell several packages of tea, and then and there, at the house of one *Henry Grove*, sold to the said *Henry Grove*, one of the said packages, containing a quarter of a pound of tea; and afterwards, on the same day, in the city of *Worcester*, he the said *George M'Gill*, as such agent as aforesaid, carried to sell, and exposed to sale, at the house of one *William Perkes*, another package, containing also a quarter of a pound of tea, but did not sell the same. At the several times when the said *George M'Gill*, as such agent as aforesaid, so carried to sell, and sold the said first-mentioned quarter of a pound of tea, and so carried to sell, and exposed to sale, the said last-mentioned quarter of a pound of tea, neither he, nor the said *Daniel Salisbury*, his employer, had any license, according to the 50 *Geo. 3. c. 41*. The question for the opinion of the Court is, whether the defendant was duly convicted.

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*Dexman, C. S. and Winter*, who opposed the order of Sessions, being asked by the Court what were the objections to the conviction, stated them as follows:—First, that this kind of dealing in tea, not being licensed at all by the Hawker's and Pedlar's Act, is equally illegal, with a license, as without, and is therefore an offence against 12 *Geo. 3. c. 46. s. 6*, under which alone it is properly punishable. Second, that it is not stated in the conviction, that the tea was carried to sell, exposed to sale, or sold, in an unentered place, which according to the statute last-mentioned it should be. And, third, that the appellant, having acted as an agent or servant to another, is not liable to the penalty imposed by either of the statutes.

*Pearson and Russell*, in support of the order of Sessions, contended, first, that although the appellant had

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offended against two separate statutes by one act, still, he was punishable by both, or either separately. Second, that the provision respecting unentered places, was no part of the statute under which the appellant had been convicted, and therefore did not apply to the case. And third, that the defendant was equally liable, whether acting as agent or principal, the statute being expressly applicable to both, and they cited *Rex v. Turner*(a).

*Denman*, C.S. and *Winter*, contra, insisted, that as the act of selling tea by the appellant was, by another statute, made equally illegal, with, or without a license, he had been guilty of no offence against the Hawker's and Pedlar's Act, and could therefore not be convicted under it; the remedy provided by the latter statute not being cumulative upon that of the former. The statute 9 Geo. 2. c. 35. s. 20, makes it unlawful for any hawker or pedlar to sell tea, and therefore a hawker's license would not legalize the sale of tea by a person trading as a hawker. If the defendant has been guilty of any offence, he was punishable only under the 12 Geo. 3. c. 46. They cited *Roll's Abridgment*(b), *Beckford v. Hood*(c), and *Townsend's case*(d).

The COURT took time to consider the case, and judgment was now delivered by

BAYLEY, J.—This was a conviction under 50 Geo. 3. c. 41. s. 17, for selling tea without a license, and the principal question was, whether the defendant, being a hawker, and selling tea in that character, but without a license, was within the operation of the statute. There was another question which might have been raised,

(a) 4 Barn. &amp; Ald. 510.

(b) 1 Roll's Abr. 106, pl. 16.

(c) 7 T. R. 620.

(d) Plowd. 113.

namely, whether the penalty of 10*l.* in which he was convicted, was the proper penalty to be imposed upon him. Upon that point, the Court gave their opinion in *Rex v. Websdell*(a), in which we are further confirmed by a subsequent consideration of the case. We have looked into the several Acts of Parliament relating to this subject, and upon a careful review and comparison of them all, we are of opinion that the defendant was properly convicted under this statute, and in the right penalty. The main argument against the conviction was, that as another Act of Parliament has made it illegal to sell tea at all in an unentered place, even with a license, the selling it without a license was no offence within this Act of Parliament; and if there was no statute in existence upon this point, of a prior date to the two already alluded to, that argument might perhaps be tenable. But when we review the entire history of the law relating to hawkers and pedlars, it becomes clear, that the 50 Geo. 3. is intended to include persons selling tea without a license, as well as those who may so deal in any other article. The first statute is the 8 & 9 W. 3. c. 25, which, after reciting that additional duties have been laid upon coffee, tea, &c., enacts, that every hawker, &c. shall pay a duty of 4*l.* Then, the 9 & 10 W. 3. c. 27, recites, and continues the former act, imposing the same duty on every hawker, &c., carrying to sell, or exposing to sell, any goods, wares, &c., and contains two clauses imposing penalties, which are very important in the consideration of this case. The former, by section 3, imposes a penalty of 12*l.* upon every hawker, &c., so trading as *aforesaid* without a license; the latter, by section 8, provides, that the Justice, before whom any offender is convicted, “shall cause *the said sum of 12l.* to be forthwith levied by distress and sale of the offender’s goods.”

(a) Vide ante, 44.

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We then come to the 50 *Geo.* 3., by the 17th section of which the penalty of 10*l.* is imposed, and in which three distinct terms are made use of, which it is material to examine with care. The words are, "If any such hawker," &c. "shall trade as aforesaid, *without*, or *contrary* to, or *otherwise than shall be allowed by*, such license, he shall forfeit, for each offence, the sum of 10*l.* These three distinct expressions were not hastily or unintentionally introduced, but clearly apply to three separate offences. Then section 20, referring to section 17, enacts, that the Justices before whom any offender is convicted, "shall cause *the said sum of 40l.* to be levied," &c. This is clearly a mistake; the 17th section mentions no "said sum of 40*l.*;" the sum there is 10*l.*, and it undoubtedly ought to be the same in the 20th section. The intermediate clause 19, does impose a penalty of 40*l.*, and thence probably the mistake arose. The former act of 9 & 10 *W.* 3. contained no clause similar to the 19th in this act, but it does contain clauses expressly answerable to the 17th and 20th in this act; and as the sum mentioned in both clauses there is the same, it is clear that the sum should be the same in both clauses here. It is perfectly manifest, that the words "trading without such license," in the 8 & 9 *W.* 3. means trading without having himself taken out a license, and such also is the plain sense of the 9 & 10 *W.* 3. The next statute in point of date, which refers to hawkers and pedlars, is the 25 *Geo.* 3. c. 78, but there are some intermediate statutes, by which the law respecting the sale of cambrics and of tea, was in some degree altered. The 10 *Geo.* 1. c. 10. s. 14, prohibits tea from being sold in any but an entered place, thus making the right of sale local. The 9 *Geo.* 2. c. 35. s. 20, prohibits hawkers and pedlars from selling tea at all. Now, these two statutes proceeded upon very distinct views. The

former had for its object the increase of the revenue, the latter the interests of the *bonâ fide* tradesman. Upon that was founded the argument, that as the sale of tea by hawkers was prohibited altogether, the selling it without a license could be no offence, because the general prohibition had done away the particular license to sell. We are of opinion that such is not the legal effect of that statute. Where one law prohibits the sale of an article under certain circumstances, and imposes one penalty, and another prohibits the sale under other circumstances, and imposes another penalty, the latter does not impliedly repeal the former; it is cumulative upon it, and both remain in force, unless the first is repealed by express words. So in this case, the selling at all is an offence under one statute; the selling without a license is an offence under another statute; the latter is cumulative, and therefore constitutes two offences, for either of which the party is punishable. Then, in the 25 Geo. 3. c. 78, we first find the words "otherwise than shall be allowed by such license" introduced, which were clearly intended to apply to hawkers selling those articles without a license, the sale of which was previously prohibited *in toto*, and not protected even by a license, and there the penalty of 10*l.* is imposed. The 29 Geo. 3. c. 26, repeals the last-mentioned act, but continues the penalty of 10*l.* as before; it however constitutes another offence, on which it inflicts a penalty of 40*l.*, and in providing for the levy of the first penalty of 10*l.*, it inadvertently says, "the said sum of 40*l.*" This is clearly an error, and is followed up in the later act of 50 Geo. 3. c. 41. From this historical view of the different statutes, it is perfectly clear that 10*l.* is the penalty intended to be imposed upon the offence of which this defendant has been convicted; and that the words "without a license" must refer to a man who has not taken out any license, and who has no license in his

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possession any where. We are therefore of opinion, that, as the 50 Geo. 3. c. 41. s. 17, imposes a penalty upon every hawker selling tea without a license, and the intermediate acts, which prohibited the selling it at all, do not relieve a party from the penalty imposed by the former act for selling *any* goods, &c. without a license, the defendant in this case has been properly convicted, and the order of Sessions must be confirmed.

Order of Sessions confirmed.

The KING v. JOHN MAYALL and others.

A notice of appeal against the allowance of overseers accounts, that the different items thereof, (enumerating them), would be objected to, without specifying the particular causes or grounds of appeal, pursuant to 41 Geo. 3. c. 23. s. 4, is insufficient.

**T**HIS was an appeal against the allowance of overseers accounts for the township of *Quick*, in the parish of *Saddleworth*, in the West Riding of *Yorkshire*. At the Sessions, it was objected for the respondents, that the notice of appeal was insufficient, because it did not state and specify the particular causes or grounds of appeal, pursuant to 41 Geo. 3. c. 23. s. 4, but merely transcribed every payment in the overseers accounts, without suggesting any matter or cause of objection thereto. The Sessions, however, over-ruled the objection, considering the mode in which the accounts have been kept, and after hearing the appeal, disallowed the overseers accounts, but reserved a case for the opinion of this Court.

*E. Alderson*, now appearing to support the order of Sessions, was directed to confine himself to the preliminary objection as to the sufficiency of the notice of appeal, and he contended, that this, like all other notices, must be taken with reference to the subject-matter, and the

objection here being, that there was no sufficient proof of the fact of payment of the items in the overseers accounts, the notice in question was insufficient.

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BAYLEY, J.—The notice of appeal being merely general, that the different items, enumerating all of them, will be objected to, without stating for what reason any one of them will be objected to, is clearly insufficient, and therefore I think the order of Sessions must be quashed.

HOLROYD and BEST, Js. concurred.

Order of Sessions quashed.

*Littledale* and *J. Williams* were to have argued for the defendants.

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The KING v. The INHABITANTS OF SHIPDHAM.

**T**WO Justices, by their order, removed *John Hall*, his wife, and four children, from *Shipdham* to *Thursford*, both in the county of *Norfolk*, which order, on appeal, the Sessions quashed, subject to the opinion of this Court on the following case:—

In *March*, 1818, *Sir Charles Chadd*, leaving his mansion-house and estate at *Thursford*, agreed with the pauper to take care of his garden, hot-houses, vines, wall-trees, pleasure-grounds, &c., and for his so doing, the pauper was allowed to take the issues and profits of part of the garden, and to live in a cottage contiguous to the

Where the owner of a mansion-house and gardens, agreed with the pauper to take care of the garden, and for his so doing he was to take the issues and profits of part thereof, and to live in a cottage contiguous thereto, belonging to his master, and he was to

continue in the premises for a year, unless some other person before that time should occupy the mansion, in which case the gardens were to be delivered up; and the pauper continued in the occupation of the garden on these terms for more than a year, the produce being worth to him 70*l.* per annum:—Held, that the pauper being only a servant, and the residence not being his own, he did not come to settle within the meaning of 13 & 14 Car. 2. c. 12.

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garden belonging to Sir *Charles Chadd*, of the yearly value of 4*l.*, to which a small common right was attached. The pauper was to continue in the premises for a year, before any further agreement was to take place between him and Sir *Charles Chadd*, unless some other person should, before that time, occupy the mansion, &c.; in which case the gardens, &c. were to be delivered up by the pauper. The pauper continued in the occupation of the garden under the above terms for a year and a quarter. On the hearing of the appeal, it appeared that the produce of the garden was worth 70*l.* a-year to the pauper, and that the expense of keeping up the pleasure grounds, &c. together with the value of the pauper's labour, would amount to as much as the issues and profits which the pauper was allowed to take. Two points arose for the decision of the Court, first, whether, under the above circumstances, there was a coming to settle on a tenement, or whether the pauper was not a mere servant, to take care of the gardens; and second, if a tenement, whether the keeping up the gardens, &c. could be deducted from the value of the produce of the garden, and thereby reduce it under the value of 10*l.* a-year.

*E. Alderson*, in support of the order of Sessions, was stopped by the Court.

*Denman*, C. S., *contra*, contended, that the pauper, under the circumstances stated in the case, must be considered as the tenant, paying rent in the shape of labour, and consequently that he thereby gained a settlement.

BAYLEY, J.—Where did he reside? Not upon a tenement of his own. He resided in a cottage of Sir *Charles Chadd*, and we were of opinion yesterday(a), that

(a) See *Rex v. Bardwell*, ante, p. 53.

in order to confer a settlement by renting a tenement, the party must have a residence which might be called his own home, as tenant; and that where he resides in the character of servant merely, that would not be sufficient to satisfy the words of the statute "coming to settle."

This pauper had the garden merely as servant.

HOLROYD and BEST, Js. concurred.

Order of Sessions confirmed.

The KING v. Sir OSWALD MOSLEY, Bart.

**BY** a rate made under the authority of the 32 Geo. 3. c. 69, "An Act for cleansing, lighting, watching, and regulating the towns of *Manchester* and *Salford*," the defendant was assessed "in respect of his occupation of the market sites, streets, lands, and tenements, at the *market-place*, *Shude Hill*, *Smithy Door*, and at various other streets in *Manchester*, and the tolls, dues, rates, and profits in respect thereof." Upon appeal, the Sessions confirmed the rate, subject to the opinion of this Court, on the following case:—

The act of 32 Geo. 3. c. 69, authorizes the Commissioners appointed thereby, to raise money by rates or assessments, "upon all and every the several tenants or occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens, or garden grounds, and other tenements, situate, standing, lying, and being within the said town of *Manchester*." The rate upon the appellant was duly made and allowed according to the requisites of the act. The appellant is lord of the manor of *Man-*

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By the *Manchester and Salford Paving and Lighting Act*, 32 Geo. 3. the tenants and occupiers of all messuages, houses, &c. and other tenements within the same towns are liable to be rated. The lord of the manor of *Manchester*, being owner of the market in that town, is not liable, under this act, to be rated in respect of his occupation thereof, and the tolls arising therefrom as the occupier of a tenement.

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chester, and owner of the markets there, and of all the waste lands within the manor. The profits arising from the markets in respect of which he is assessed, are equal to the amount of the assessment. The markets are held three days in each week, in the several places named in the assessment, which are public streets in *Manchester*, over which the public have a right to pass and repass, subject to the holding of the markets, which holding always in a great measure, and sometimes entirely, obstructs the passing and repassing with carts and horses. The appellant is not an inhabitant of *Manchester*, nor an occupier of the soil whereon the markets are held, except so far as the facts of this case may constitute him an occupier. The profits received by the appellant are paid to him by the persons using the markets, for the privilege of exposing their commodities to sale there, whether they effect a sale or not; if the commodities pass through several hands in the market, each person exposing them to sale, pays the appellant for that privilege. The baskets, sacks, tubs, and stalls, used by such persons, are provided by themselves, and are either carried by hand or laid on the pavement; they are not fixed to the ground. The stalls are of various sizes, and are paid for in proportion to their size. The payments for the stalls are collected weekly, but those for the baskets, sacks, and tubs, on the day on which they are used. All persons who keep stalls within the town and manor of *Manchester*, for the exposure of commodities to sale, pay stallage to the appellant; and every person found in the manor exposing to sale any commodity in any basket, tub, cask, or sack, pays toll for the same to the appellant, whether he is stationary, or moving about from one part of the manor to another. The sums paid to the appellant for the privilege of using the market with stalls, have occasionally varied; those paid for baskets, &c. have al-

ways been the same; respect being had to the quantity and quality of the commodities. There are butcher's stalls in *Manchester* belonging to the appellant, where the stalls are affixed to the freehold; those stalls are rated separately, in the names of the actual occupiers and renters; but the appellant, by express agreement with them, pays the rates for them. These butcher's stalls are quite distinct from the other stalls above-mentioned.

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J. Williams and *Starkie*, in support of the order of sessions, endeavoured to distinguish this case from *Rex v. The Manchester Water Works Company* (a), on the ground that the defendants there had no ownership of, and no interest in, the surface of the ground; whereas here, the defendant was owner of the soil upon which the market stood, and had a direct beneficial interest in the whole of the surface, and in the improvement of the town. They also contended, that as it was clear that these market tolls would be rateable if the Act of Parliament had used the word "grounds" or "lands," instead of the word "tenements," the Court would, from the object of the statute, and from the relative situation of the word, consider it as equivalent to "lands," in order to give the greatest possible effect to the provisions of the act; and upon this point they cited *Co. Litt.* 6 a. and 19 b. *Rex v. Wickham Market* (b), *Rex v. Jolliffe* (c), *Rex v. Macdonald* (d), and 2 *Nol. P. L.* 7.

Littledale and *Parke*, contra, were stopped by the Court, and

PER CURIAM. This case is not distinguishable from *Rex v. The Manchester Water-Works Company*, so re-

(a) Ante, vol. i. 479.

(b) 3 *Keb.* 140. 1 *Freem.* 419.(c) 2 *T. R.* 90.(d) 12 *East*, 324.

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cently decided. That case was very fully argued and considered, and the meaning of the word "tenement," as used in the statute, was most minutely discussed and weighed. The construction which the Court put upon the word "tenement" in that case, is the only construction it can receive in the present, and therefore, as we are of opinion that the market tolls in this case are not a tenement within the spirit and meaning of the Act of Parliament, they are not liable to this rate, and the order of Sessions confirming it must be quashed.

Order of Sessions quashed.

The KING v. The INHABITANTS of PENEGOES and
MACHYNLLETH, (In Error) (a).

Indictment for not repairing a bridge, described as situate within the parishes of P. and M., and averring that the inhabitants of P., and the inhabitants of the township of M., were liable to repair, without going on to state what part of the bridge was situate within the township of M., and that the inhabitants thereof were liable to repair, is erroneous.

ERROR from the Quarter Sessions from the county of *Montgomery*. The indictment stated, that a certain bridge, called, &c. situate within the parishes of *Penegoes* and *Machynlleth*, was ruinous and out of repair, and that the inhabitants of the parish of *Penegoes*, and the inhabitants of the township of *Machynlleth*, were liable and ought to repair the same, *ratione tenuræ*. The defendants having been found guilty, and fined in one sum of 400*l.*, error was now brought in this Court. Assignment of errors. 1. That the indictment avers, that the bridge is situate within the *parishes* of *Penegoes* and *Machynlleth*, without describing what part of it is situate within each, and without alleging that any part is within the *township* of *Machynlleth*. 2. That it avers generally that the inhabitants of the parish of *Penegoes*, and the inhabitants of the township

(a) Vide ante, vol. i. page 243.

of *Machynlleth*, are liable to repair the bridge, without describing what part each are separately liable to repair.

3. That it does not aver that the bridge is a common and public bridge. 4. That the inhabitants are not described as bodies corporate; and 5. That the inhabitants of the parish, and the township, being in fact separate bodies, were fined in one sum.

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Sir *W. Owen*, for the defendants. It does not appear upon this indictment, that any part of the bridge is within the township of *Machynlleth*, and therefore there is no liability to repair alleged as against the inhabitants of that township. This is clearly irregular; *Wentw. Plead.* vol. vi. 407, *Rex v. St. Pancras(a)*, and *Rex v. Gamlingay(b)*. The Court stopped him, and called upon

Campbell, contra, upon this point, who contended, that the Court would presume that the township of *Machynlleth* was within, and part of, the parish of *Machynlleth*, and then the averment that the parish was liable, would be a sufficient averment that the township was liable also, and that the bridge, being within the parish, was within the township also. The obvious meaning of the averment was, that the bridge was situate within the township, and it was impossible to draw any other inference.

PER CURIAM. It is unnecessary to discuss the other points, because it is quite clear that the indictment is defective, in not averring that the bridge is situate within the township of *Machynlleth*. The Court cannot infer any thing in support of an indictment against a defendant; and in this case it might lead to very great injustice,

(a) Peake's N. P. C. 219.

(b) 3 T. R. 513.

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because a whole parish might thereby be held liable, when in fact only a part was liable to repair. This indictment does not aver that the bridge is situate within the township, nor that the township is situate within the parish, and in that respect it is clearly insufficient. Upon this ground, therefore, the judgment of the Court below must be reversed.

Judgment reversed.

The KING v. The INHABITANTS of KINGMORE,
(In Error.)

A parish is liable as of common right to repair all highways therein, but an indictment will not lie against a district called an extra-parochial hamlet, for not repairing a public highway within the same, unless some special ground of liability to repair is alleged.

INDICTMENT against the inhabitants of the extra-parochial hamlet of *Kingmore*, in the county of *Cumberland*, for not repairing a certain part of a certain common and ancient king's highway, in the said hamlet, leading from *Longtown* to the village of *Stainton*, in the said county. The indictment alleged generally, that the defendants "ought to repair and amend the said highway, when and so often as it should be necessary." On not guilty pleaded, the defendants were convicted at the *Cumberland Quarter Sessions*, and adjudged by the Court to pay a fine of 120*l*. A writ of error being brought in this Court, upon the said judgment, the error assigned was "that it does not appear, nor is it alleged or shewn in the indictment, that the inhabitants of the said extra-parochial hamlet have used, and been accustomed, and of right ought to repair and amend the same road; or in what right, for what cause, by what obligation, or upon what account, the said inhabitants ought to repair and amend the same, &c." Joinder in error.

Courtenay, in support of the writ of error, was stopped by the Court.

Aglionby, contra. The form of indictment adopted in this case, is the only one which can be used with propriety against an extra-parochial district. An extra-parochial district stands, as far as respects the liability to repair highways, in the same situation as a parish. In legal construction, a parish is not to be considered according to ecclesiastical divisions, but as a district following the civil and temporal divisions. It is clear, that a parish is not liable by custom, but is bound to repair as of common right. *Rex v. Morris*(a). This common right existed long before the ecclesiastical division of the country into parishes. For the purpose of liability, the civil divisions are paramount to the ecclesiastical, and therefore every district in the country is still liable to repair its roads, although it be not what is called a parish. The word "parish" does not necessarily import a place having a church; it is a word which has been introduced by misuse, till at last it has been supposed to mean a separate district. The case of *Addison v. Sir John Astley*(b) is an authority to shew that parishes were not at first recognized by common law, and that the word "parish" does not mean an ecclesiastical division merely, but a certain known district or division. In that case it is said, that originally the kingdom was divided into vills, which, by analogy to the division called a parish, would equally render a vill liable to repair as of common right. It is true, that here the district is not called a vill, but though it is described as an extra-parochial hamlet, still it does not follow, that it is to be considered as a component part of a parish. In common acceptance, the term "hamlet" is the same as "vill." In *Rex v. Morris*, Lord Kenyon says, "vill" and "hamlet" are in common acceptance used as synonymous terms. This is also said

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(a) 4 T. R. 550. See 5 Burr. 2700, and 2 T. R. 513.

(b) Freem. 228.

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in *Rex v. Welbeck* (a). It appears on record, that this hamlet is at least a known district, and it is therefore liable to repair its own highways. There is no part of the kingdom in which the liability to repair its own roads does not attach. This is a liability imposed by the common law, and if it be admitted that this is a district by itself, then the liability attaches. [Bayley, J. Then, if that be so, you would be able to predicate of this extra-parochial hamlet, that it was under an immemorial obligation to repair.] It is liable of common right, inasmuch as it stands *in loco* of a parish, though not called a parish *eo nomine*. There can be no immemorial right predicated of it, for there can be no immemorial usage to repair in an extra-parochial place. It is liable of common right, though not a parish, and if not liable on that ground, no liability at all would attach. A vill would probably be liable to repair; *Rex v. Oxfordshire* (b), and *Rex v. Yarnton* (c); and these are authorities to shew that the word "vill" is a civil division, and contemplated as liable to repair at common law. [Bayley, J. In this case you would have this difficulty to contend with, that "vill" is a known legal term; "hamlet" is not.] But supposing "hamlet" and "vill" not to be synonymous, still a hamlet is a district, and becomes liable as of common right. He cited 1 *Inst.* 59. 7 & 8 *W. 3. c. 29. Vin. Abr. tit. Parish*, 183, and *Rudd v. Morton* (d).

BAYLEY, J.—I am of opinion that there is error on this record. It must be shewn on the face of an indictment for not repairing a road, that the parties indicted are liable as of common right, or that there is some ulterior ground on which the obligation to repair is cast upon them. A parish is liable as of common right, and

(a) 1 Bott. 34.

(b) 1 Sid. 140.

(c) 1 Keb. 498.

(d) 2 Salk. 501.

therefore in such case, all that is necessary to state is, that the inhabitants of right ought to repair. It is not necessary to state, that they had repaired, but merely that the common law obligation attached to them. When, however, part of a parish is indicted, the prosecutor is bound to shew in what respect the obligation attaches. The general rule is, to shew that the inhabitants of the place from time immemorial, have repaired either the particular road, or all roads lying within the district. The case of *Rex v. Penderryn (a)*, was a presentment against a hamlet, parcel of a parish, but inasmuch as it did not allege an immemorial obligation, and had not shewn any specific cause why the inhabitants of that particular part of the parish were liable to repair, the judgment was arrested. It is insisted in this case, that the Court are bound to consider an extra-parochial hamlet as if it were a parish, and therefore liable as of common right. I think we are not warranted in coming to any such conclusion. This indictment is not framed so as to raise the question whether this particular hamlet is or is not of common right liable. Suppose the law to be, as stated in argument, that there is no place in the kingdom which is not bound of common right to repair the roads within it, unless it lies within a parish, still it would be necessary to shew, on the face of the indictment, that the place was not connected with any other place liable, and that the law threw upon it the obligation of repairing all its own roads. If it can be alleged, that it has time immemorially repaired its own roads, then the law throws the same obligation on a hamlet as it does on a parish; but if it cannot be alleged, that it has immemorially repaired all its own roads, then, in order to raise the question of liability, the indictment should have stated, that the extra-parochial hamlet was not part or parcel of any parish or other place connected

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with it; and that it was under an obligation to repair its own roads. This indictment, however, does not raise the question, and therefore we are not called upon to decide, whether an extra-parochial place, not constituting part of one general district, is or is not bound to maintain its own roads. I therefore think this indictment is bad.

HOLROYD, J.—I am of the same opinion. The allegation here is merely an allegation of fact and not of law. It shews no liability on the part of the defendants to repair, as inhabitants of an extra-parochial hamlet. If an extra-parochial district is to be put in the same situation as a parish, it must be shewn to be a sole district standing by itself, and lying under the obligation to repair its own roads; and that circumstance distinguishes this from the case of an indictment against a parish. Here the indictment is not framed in a manner to raise the question, whether this extra-parochial hamlet, (assuming it to be completely a separate district by itself) is liable to repair its own roads.

BEST, J.—If this indictment were held good, it would be a departure from the general principle on which the liability to repair roads attaches to parishes. Admitting that the civil are much older than the ecclesiastical divisions of the country, still it is by no means proved, that a hamlet belongs to the civil divisions. This is by name described as an *extra-parochial* hamlet. Now, though the civil are older than the ecclesiastical divisions, still *a parish* unquestionably belongs to the ecclesiastical divisions. It is admitted, that the ecclesiastical divisions have existed nine hundred years, which is two hundred years longer than necessary for common-law rights to attach. No case has been cited in which it has ever yet been decided, that the mere common law obligation

to repair, can be cast on any other division of the county than a parish. None of the cases cited bear out that proposition. In some cases undoubtedly the obligation to repair is cast upon the inhabitants of a particular place *ratione tenuræ*, or by immemorial usage; and if in this case it could with propriety be stated, that the defendants had from time immemorial repaired this road, and the indictment had contained that averment, I should have thought it sufficient. It is said, that this is a known district, and therefore the common law right attaches, but I think, if we look to the history of the civil as well as ecclesiastical divisions of the country, we shall find that all these extra-parochial places were excused from the common law burthens. If this be a defect in the law, it is for the Legislature to remedy it; but attending to the principle on which the common law attaches the burthen of repair, I think this indictment is insufficient, for not shewing some ground on which the burthen of repairing is cast upon these defendants.

Judgment reversed (a).

(a) Vide Magna Charta, 9 Hen. 3. 1 Bla. Com. 119. Skin. 685. 17 Geo. 2. c. 37. 1 Vent. 113.

The KING v. The INHABITANTS of GEDDINGTON.

BY order of two Justices, *John Garfield, Elizabeth* Vendor contracted in writing with vendee for the sale of a messuage with immediate possession, at the price of 310*l.*, to be paid in two instalments, the first on 30th November, and the second on 24th June following, when the vendor was to make out a good title, and execute a conveyance, but in case of non-payment of the money on that day, the agreement to be void. Vendee having paid the first instalment, was let into, and remained in possession for more than a year and a half afterwards, but never paid the last instalment, nor had any conveyance executed. An action was brought by vendor for the remainder of the purchase-money, but discontinued upon vendee giving up the contract, and receiving back part of the first instalment:—Held, 1st. That by this contract the vendee did not gain a settlement under 9 Geo. 1. c. 7. s. 5, by the purchase of an equitable estate; and, 2d. That he had not such a possessory right, during the interval from the 30th November to the 24th June, as to gain him a settlement, by renting a tenement of 10*l.* value under 13 & 14 Car. 2. c. 12.

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parish of *Geddington*, in the county of *Northampton*, to the parish of *Dunton Bassett*, in the county of *Leicester*, The Sessions, on appeal, quashed the order, subject to the opinion of this Court, on the following case:—

In *November*, 1814, the pauper, *John Garfield*, being then resident in *Geddington*, entered into the following agreement with one *Richard Nason*:—"Articles of agreement made and entered into the 24th *November*, 1814, between *Richard Nason*, of, &c. of the one part; and *John Garfield*, of, &c. of the other part, viz. the said *R. N.* doth hereby agree to sell to the said *J. G.* all that messuage, situate at *Dunton Bassett*, in the county of *Leicester*, called or known by the name or sign of *The Boot and Shoe*, together with all the out-buildings and other appurtenances thereunto belonging, at or for the price or sum of 310*l.*, to be paid at the times and in the manner hereinafter mentioned, viz. the sum of 160*l.* on the 30th of this instant, *November*; and the sum of 150*l.* on the 24th *June* next, with interest for the same, after the rate of 5*l.* for 100*l.* for a year, from the date hereof. And the said *R. N.* doth hereby agree, at his costs and charges, to make out a good marketable title to the above premises, and to convey the same free from incumbrances, at the costs and charges of the said *J. G.* on the said 24th *June* next, on payment of the said sum of 150*l.* with interest as aforesaid. And the said *J. G.* doth hereby agree with the said *R. N.* to pay him, on the said 30th *November* instant, the said sum of 160*l.*, and also the further sum of 150*l.*, with interest as aforesaid, on the said 24th *June* next, on having the said premises, hereby agreed to be sold, conveyed to him the said *J. G.*, his heirs or assigns, or as he or they shall direct or appoint. And it is hereby agreed between the said parties, that on payment of the said sum of 160*l.*, the said *J. G.* shall be let into possession of the said premises; but in case

default shall be made by him in payment of the said sum of 160*l.*, at the day aforesaid, this agreement shall be void, to all intents and purposes. And the said *R. N.* shall be at liberty to sell the said premises by public auction, as now advertised, on the 5th *December* next, without any interruption by the said *J. G.*" The sum of 160*l.* was paid on the day appointed, and full possession then given by *Nason*, and the pauper resided in the house in *Dunton Bassett* for a year and a half and upwards; but he never paid the 150*l.* so agreed to be paid on the 24th *June*, nor was any conveyance ever executed. An action at law was brought by *Nason* for the 150*l.*; but afterwards, by agreement between the parties, the same was discontinued; *Nason* paying the costs, and returning to the pauper 30*l.* of the said 160*l.*, and the pauper agreeing to give up the contract and the possession, which was accordingly done.

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*Reader, Adams, and Holbeck*, in support of the order of Sessions. The pauper is not settled in *Dunton Bassett* by the occupation of the premises mentioned in the case. It is clear that he had no legal estate in them, and there is as little reason for holding that he had an equitable estate. This cannot be considered as an equitable estate, unless a Court of Equity could be called upon to decree a conveyance. Now a Court of Equity would not decree a conveyance, unless the pauper had paid or was ready to pay the whole consideration money. The contract in this case was rescinded, in consequence of the non-payment of the money; the possession of the premises was restored, and a sum of 30*l.* given back to the pauper, in order to bring the transaction to a close. It must be taken, therefore, under these circumstances, as if the contract had never existed, and consequently the pauper never could be considered as having an equitable estate. At the utmost this is a case of doubtful equity,



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and a Court of Common Law will never take notice of a doubtful equitable estate. *Rex v. Standon* (a), *Rex v. Toddington* (b), *Rex v. Horndon-on-the-Hill* (c), and *Rex v. Hagworthingham* (d). In *Rex v. Horndon-on-the-Hill*, Lord Ellenborough says, "we ought to see that the party has clearly an equitable interest, and not merely such a claim as might possibly induce a Court of Equity to interpose in some way or other." Here there is clearly not an equitable estate, and supposing it to be doubtful, this Court cannot act upon it. [Bayley, J. In *Trinity Term*, 57 Geo. 3, the case of *Rex v. The Inhabitants of Long Bennington* (e), was determined, which appears to me to be decisive of this. In that case the pauper agreed by parol to purchase a copyhold for 150*l.*; he paid 34*l.* in part performance of the contract, and entered into possession, and continued in near six months. Whether any specific day was allowed for paying the remainder of the purchase-money I do not know. The contract was then rescinded, because the vendor would not give an indulgence he had promised for the residue of the purchase-money, and he returned the pauper 14*l.* The question was, whether this conferred a settlement. This Court held it was no settlement, because the pauper had purchased no estate or interest in the land for which he could make a claim in equity, without paying the remainder of the purchase-money; and although an equitable estate is sufficient to confer a settlement, still the questionable right to go into a Court of Equity will not. The only difference between that case and this is, that there the agreement was by parol; here it is in writing, and it may be argued, perhaps, that the pauper was irremovable for forty days, between the period from the

(a) 2 M. & S. 461.

(b) 1 B. & A. 560.

(c) 4 M. & S. 562.

(d) Antc, vol. i. p. 476.

(e) Not reported.

30th *November*, when he paid the 160*l.*, and the 24th *June* following.] If he was irremovable during that period, he certainly would gain a settlement; but there is not the least pretence for saying that he was during that time irremovable. A party must be irremovable, on the ground that the property is his own, or that he has such a vested estate either at law or equity, as that it may be called his own. But what estate had the pauper here? None. It is very true that if this was an inchoate contract, which was afterwards to be completed, he might have been considered as having a legal or equitable estate of his own from the moment he was let into possession; but until he had paid the remainder of the purchase-money on the 24th *June*, he had not a particle of title to the property, either in law or equity. This is not like the case of a purchase within the 9 *Geo.* 1.; it is not the purchase of a possessory right from the 30th *November* to the 24th *June* for 150*l.*, but merely an agreement to remain in possession up to that time, at which period he was to pay the rest of the money. It is clear, therefore, that the pauper has gained no settlement by estate. Has he acquired one by renting a tenement within the 13 & 14 *Car.* 2. c. 12? Certainly not. Assuming the messuage in question to be worth 10*l.* a year, still he did not come to settle on the property in the character of tenant, and therefore on that ground he is not settled. *Rex v. St. John's Glastonbury*(a). At the utmost this was a mere license to occupy, conveying no interest, and conferring no right of settlement in the parish of *Dunton Bassett*.

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. *Nolan, Marriott, and Amos*, contra. The pauper had either an equitable estate, or had such a possessory right, as would confer a settlement, by a residence of forty days. In the first place, this is an absolute agreement for the

(a) 1 B. & A. 481.

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present purchase of the premises, which it would have been competent for either party to enforce on the 24th June. If that be so, then, independently of any other question, there is no doubt that it will, according to authorities, constitute an equitable interest, and confer a settlement when coupled with occupation. Here the agreement itself was absolute, in the first instance, and was not to remain *in fieri* until full payment of the purchase-money. The non-payment of the 150*l.* does not make the agreement void. It was not so treated by the parties themselves, because the vendor brought an action to recover the remainder of the purchase-money, although that action was afterwards settled. The title to the property was complete in the pauper from the moment possession was given under the agreement. Undoubtedly the title might be defeated, unless the pauper had paid the remainder of the purchase-money, and he could not himself have enforced it unless the money was so paid; but still his equitable title is complete from the moment he comes into possession, and is only defeasible upon non-payment of the remainder of the money. At all events the pauper had an interest from *November to June*, which rendered him irremovable. This is not like the case of a license to reside. It is the conveyance of a positive interest. A mere license is personal, and no interest passes under it capable of assignment; but here there was an interest which, coupled with residence, would confer a settlement. *Rex v. Fillongley*(a), *Rex v. Offchurch*(b), *Rex v. Cold Ashton* (c), and *Rex v. Edington* (d). The cases cited on the other side are distinguishable from this, because all those were cases of doubtful equity. [*Bayley, J.* An equitable is as good as a legal estate for

(a) 2 T. R. 709.

(b) 3 T. R. 114.

(c) Burr. S. C. 444.

(d) 1 East, 288.

the purpose of settlement. If, therefore, you can make out that the relation of trustee and *cestui que* trust subsisted between these parties, then the pauper would have an equitable estate.] Still that would be a doubtful equity. This is not a doubtful equity, and that makes all the difference. The case of *Rex v. Long Bennington*, mentioned by the Court (a), is distinguishable from this, because there the agreement was by parol, and it did not appear when the purchase-money was to be paid. There the pauper had no assignable interest; he might have been put out of possession at any time; it was a mere parol promise to give him a title whenever he should pay the rest of the money. Here is a written agreement conveying a present interest in possession, and the pauper could not have been turned out. Under any circumstances, it is quite clear, that from *November to June* the premises actually vested in him, and having paid more than 80*l.*, he could not during that period have been removed, and consequently gained a settlement. In addition to the cases already mentioned, they cited *Rex v. St. Michael's Bath* (b), *Wall v. Bright* (c), *Knollys v. Shepherd* (d), *Clarke v. Wright* (e), *Green v. Smith* (f), *Douglas v. Whitrong* (g), *Townley v. Bedwell* (h), *Payne v. Meller* (i), *Holdfast v. Clement* (k), and *Clinan v. Cooke* (l).

BAYLEY, J.—I am of opinion that there was no settlement gained in *Dunton Bassett*. It is very desirable in settlement law, that the decisions of the Court should be uniform and consistent. That law throughout the kingdom is generally administered by an extremely useful body

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(a) Cited 3 Dowl. &amp; Ry. p. 405.

(g) 16 Ves. 253.

(b) Doug. 630.

(h) 14 Ves. 591.

(c) 1 Jac. &amp; Walk. 494.

(i) 6 Ves. 349.

(d) Cited in 1 Jac. &amp; Walk. 499.

(k) 1 T. R. 761.

(e) 1 Atk. 12.

(l) 1 Scho. &amp; Lef. Irish Ch.

(f) Id. 572.

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of men, to whom the country is under the highest degree of obligation for sitting gratuitously to discharge a very important duty; and the question is, whether they are to have cast upon them the obligation, not merely of being common lawyers, but also of understanding all the niceties and distinctions of a Court of Equity. The 9 Geo. 1. c. 7, upon which this case arises, enacts, "that no person shall be deemed or taken to acquire a settlement in any parish for or by virtue of any purchase of any estate or interest in such parish, whereof the consideration for such purchase doth not amount to the sum of thirty pounds *bonâ fide* paid." The party therefore, is to purchase an estate or interest in land, and I apprehend the word "*interest*" there means, a definite interest, for which he contracts at the time he enters into the contract. It might originally have been considered as extending to the case of legal estates and the purchase of legal interest only; but in process of time it was decided, that where the relation of trustee and *cestui que* trust exist, the *cestui que* trust will be entitled to gain a settlement exactly as if he were clothed with the legal estate, but that was predicated of those cases only in which the party stood in the condition of a mere naked trustee, and was never extended to constructive trustees, as in the case of *Knollys v. Shepherd*, where the party would be considered as standing in that relation merely. The question has, in different instances, been before the Court, and was under consideration in *Rex v. Toddington*, in which my Brother *Holroyd* points out the difference between the case where a man has an equitable estate, and that where he has a mere right to go into a Court of Equity. Now *Rex v. Long Bennington*, is so analogous to the present case, that I can find no substantial difference between the one and the other, and when once we have got a clear decision upon a point of settlement law, we ought to adhere to

it. In that case the agreement was by parol to purchase a copyhold for 150*l.* and the sum of 34*l.* being paid down, the party was let into possession, but he was afterwards unable to perform his contract. The difference between that case and this is, that here the contract is in writing, there it was by parol, but the Court, in giving judgment, did not proceed at all upon that distinction. They considered, perhaps, from their ignorance, as a Court of Law, of what the rule in a Court of Equity might be, that the party would be entitled to go into a Court of Equity to pray a specific performance, and they said that the payment of the money, and being let into possession, did not constitute the relation of naked trustee and *cestui que* trust, inasmuch as there was a further sum of money to be paid, and that until it was paid, the seller had a beneficial interest, and consequently no settlement was gained by the contract. There is one distinction between *Rex v. Long Bennington* and this case. In that it did not appear, when the remainder of the purchase-money was to be paid: there was some indulgence to be granted to the vendee, but to what extent was not stated. Here the first payment was made on the 30th *November*, but the residue was not to be paid until the 24th *June*; and upon this part of the argument it is contended, that from this slight distinction between the two cases, the one ought to have no influence on the other; for it is said, that during the interval the pauper was irremovable. If that was the legal consequence, undoubtedly it would have the effect of conferring a settlement; but the law says, that he was not irremovable during that period. Supposing he became chargeable to the parish after a week or a fortnight from being let into possession, what was to prevent the parish officers from applying to the Justices for an order of removal? A man cannot be removed from his own; but this was not his own at law or equity, and

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there is a fallacy in that part of the argument, because it was not in equity his own until he paid the remainder of the purchase-money. I am therefore of opinion, that the pauper was removable from the 30th *November* to the 24th *June*. I am of this opinion principally on the ground, that in order to confer a settlement, if the estate is equitable only, it must be such an estate as that no other person shall have any interest in it, but in the character of a mere naked trustee, and not as a constructive trustee. For this reason I think there was not such an estate in equity vested in the pauper as would confer upon him a settlement under the 9 *Geo. 1*, and the Sessions having drawn the right conclusion, the order quashing the order of removal must be discharged.

HOLROYD, J.—I am of opinion that no settlement was gained by the pauper in the parish of *Dunton Bassett*. I think he had not an estate or interest either at law or equity, so as to gain a settlement under such an execution of the contract, as that stated in the case. Whether if more had been done by the vendee, whether if he had paid, or offered to pay, the remainder of the purchase-money, or was prevented by the vendor from doing more than he had done, he might have acquired an estate in equity, so as to confer a settlement upon him, is a very different question. The cases which have been cited, go only to shew, that if the vendee has performed part of the contract, and has been let into possession under an agreement in writing or by parol, and has offered to pay the remainder of the purchase-money, a Court of Equity will consider one party as a trustee for the other, and compel a specific performance of the contract. I think the case of *Rex v. Long Bennington* was properly decided, and is exactly similar to the present, with this difference, that there the contract was not in writing, and

that it did not appear that there was any agreement as to the period of time for which possession was to be delivered to the vendee; but those circumstances do not sufficiently distinguish that from the present case, to induce the Court to come to a different conclusion from what was there formed. In that case there was possession delivered as well as a part-payment of the purchase-money, and if those circumstances were sufficient to induce a Court of Equity to relieve, notwithstanding the contract was by parol, they would be sufficient on the same footing as if it was in writing; but that distinction was not taken by the Court. They acted upon a principle which is equally applicable to this case. Here the contract is made on the 24th *November*; part of the purchase-money is paid on the 30th, and by agreement the vendee was to be let into possession until the 24th *June*, when the remainder of the purchase-money was to be paid, and the contract completed. The effect of the agreement to deliver possession from the 30th *November* till the 24th *June*, when the 150*l.* was to be paid, is no more than this, that it might or might not amount to a demise for that period of time; but there is nothing to shew that this was a renting a tenement of 10*l.* annual value. It is argued, that the 160*l.* or at least part of it, is to be considered as paid for the right of possession during that period, as well as for the purchase of a right to compel the completion of the contract. How much of the 160*l.* was applicable to the purchase of a right of possession, *non constat*. There is nothing to shew that this was a purchase to the amount to 30*l.* within the 9 Geo. 1, because it would depend upon the completion of the contract whether the 160*l.* could be recovered back or not. Supposing the contract to be rescinded by the default either of the vendor or vendee, I question very much whether any thing could be recovered for the

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enjoyment of possession during that time, for it is part of the agreement, that the vendee is to have possession during that time, but there is no provision for the payment of money in case of any default by the vendee. Supposing any thing was to be paid for the occupation from *November to June*, *non constat* that it would be to the amount of 30*l.*, and if not, there is no ground for saying that there is any settlement gained under the 9 *Geo.* 1. For these reasons I think this case was properly decided at Sessions.

BEST, J.—I am of opinion, that the question in this case has been decided by *Rex v. Long Bennington*. Adhering strictly to the words of the statute 9 *Geo.* 1, perhaps “*legal*” estates or interests, are those only which this Court ought to take notice of; but it has been too frequently decided, that an equitable estate will confer a settlement, for us to disturb that doctrine. But what equitable estate is it that will confer a settlement? It is a complete vested equitable estate; not that which exists merely in claim. If an estate be given to *A.* in trust for *B.* the former has a legal estate, and the latter the equitable. His estate is perfect, and he has no occasion to go into equity to have it confirmed in him, because he has all the interest; but if a man contracts to purchase an estate, and pays only part of the purchase-money, I deny that he has a complete equitable estate. Equity may complete it, but until he has gone into equity, and put himself in a situation to claim the judgment of the Court in his favor, he has no estate; and therefore in that respect this differs from those cases where it was held, that an equitable estate will confer a settlement. The cases have never gone beyond a complete equitable estate, where the party has no occasion to apply to the aid of any Court to complete his title. In *Rex v. Horndon-on-the-Hill*,

Lord *Ellenborough* deprecates our consideration of doubtful equitable questions. If, in cases of this nature, we were to take notice of decisions in equity, it would lead to the greatest confusion. We are to be governed by the rules of law, and are not competent to decide nice questions of equity. If this Court feels itself in a situation of so much difficulty, *à fortiori* Courts of Quarter Sessions are not qualified to enter into such questions. This is a case of doubtful equity, and it is very questionable whether a Court of Equity would decree a specific performance, even if the vendee had been ready to tender the remainder of the purchase-money. Can we then, without overturning *Rex v. Horndon-on-the-Hill*, allow ourselves to enter into the discussion of such nice questions? I am of opinion that the pauper had no equitable estate, but if it be a question of doubtful equity, it affords a stronger reason for holding that no settlement was gained.

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Order of Sessions confirmed.



The KING v. The INHABITANTS of TAVISTOCK.

A CASE from Sessions stated, that by an order of two Justices, *Richard Williams* was removed from *Tavistock*, in the county of *Devon*, to *Calstock*, in the county of *Cornwall*, in which parish the pauper was adjudged to have gained a derivative settlement from his father; *Calstock* Where the Sessions on appeal quashed an order of removal, on the ground of its appearing that the pauper had not been *ad-*  
*duced* and *examined* before the removing Justices, touching his settlement, and it not being stated, that the pauper had not been *summoned* before the removing Justices; this Court quashed the order of Sessions, and directed a re-hearing of the appeal:

*Semble.* It is not essential to the validity of an order of removal, that the pauper should be examined, but if it is possible, the Justices are bound to examine him; and if they corruptly omit to summon him for that purpose, they are liable to an information, or to an action at the suit of the pauper, if he is removed illegally.

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appealed against the order of Sessions. In the course of the appeal it appeared, that an examination of *George Williams*, the father, touching the settlement of the pauper, had been taken on oath, but that the pauper himself, then of full age, resident with his father in *Tavistock*, and who had been so resident nine days previous to the said examination of his father, in every respect competent to, and capable of being examined, had not been *adduced* before the Magistrates, and that no examination of the pauper was ever had previous to or at the time of making the order of removal. Thereupon the Sessions stopped the further progress of the appeal, and quashed the order, subject to the opinion of this Court, upon the facts above mentioned, whether the order could be supported, the pauper not having been examined.

*Gaselee* and *Carter*, in support of the order of Sessions. The question here is, not whether the order be good on the face of it; but whether the Magistrates did a legal act in removing the pauper without taking his examination. The case states, that the Sessions quashed the order, because the fact that he was not examined, appeared to them in the course of the appeal. Now the general rule is, that the pauper is to be examined touching his settlement, not merely for the sake of his residence, but in order that he may have the opportunity of shewing cause against a step which is undoubtedly against his liberty. There may be exceptions, as where the pauper is sick, infirm, or unable to attend before the Magistrates from other sufficient cause. The cases of *Rex v. Wykes*(a), *Rex v. Bagworth*(b), and *Rex v. Everden*(c), and *Comberbach*, 478, are authorities to shew that the pauper ought to have notice and be heard, where it can be done, before his removal, and that the Court will

(a) 2 Stra. 1392.

(b) Cald. 179.

(c) 9 East, 101.

grant an information against Magistrates making an order, if they have omitted to summon him through wilful neglect. Even in cases of sickness or infirmity, the 43 Geo. 3. c. 124. s. 4, enacts, "that whenever any poor person is by age, sickness, or infirmity, unable to be brought up before the Magistrates, to be examined as to his or her settlement, it shall be lawful for one Magistrate to take his or her examination, and report the same to other Magistrates, and for the said Magistrates, on such report, to adjudge the settlement of the pauper, and make and suspend the order of removal as fully and effectually and to all intents and purposes as if the pauper had *appeared* before the Magistrates." It appearing, therefore, that the pauper here might have been examined, but was not, the Sessions did right in quashing the order of removal.


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*Nolan*, *contra*, was stopped.

BAYLEY, J.—If this order had been quashed generally, it would have been conclusive between the parties, but being quashed on a specific ground therein stated, it is not conclusive. Whether, if the form of the order of Sessions had been different from what it now appears, it would be good, we cannot decide; but taking it that the order of removal was quashed, because the pauper was not *adduced* before the Justices, I think the order of Sessions, on that ground, should not stand. The question is, whether the facts here stated, warranted the Justices in quashing the order of removal upon that ground. I agree to this, (and I wish it to be distinctly understood), that it is the duty of the Magistrates to endeavour to procure the attendance of the pauper, and if they are guilty of criminal neglect, in that respect, and corruptly make an order of removal, without endeavouring to get the

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pauper before them, they are certainly liable to be punished criminally. It may be a great hardship on a pauper to be removed, and therefore he ought, for his own sake, to have an opportunity of being heard against a proceeding which is to operate immediately on his person, and to a certain degree, in restraint of that freedom to which he is entitled, if he is forced from one place to another by means of the order of removal. But when an order is quashed, because the pauper was not *examined*, then we must look to the order, for the purpose of seeing whether there has been such culpable neglect on the part of the persons who made it, as to make it the duty of the Court to quash it. The statement of the case is not very distinct. It is stated that the Sessions quashed the order, subject to the opinion of the King's Bench, "whether such order of removal, the pauper not having been examined, could be supported under the following facts." The facts are then stated, and it is said, that the pauper being capable of being present, "had not been *ad-duced* before the Magistrate." Had he been *summoned*? That does not appear. He might have been *summoned*, and neglected to appear; or he might have been *present* before the Magistrates, but not himself desiring to say any thing upon the subject of his settlement, and the Magistrates being of opinion, that the account given by the father in his presence, was sufficient ground for removing, might have made the order of removal. It does not appear, from the beginning to the end of this case, whether the pauper was *summoned*. If he had been *summoned*, and wilfully neglected to appear, the Magistrates might proceed to make an order upon other evidence. There is no doubt of that, and therefore, though I think, generally speaking, it is the duty of the Magistrates to do all in their power to obtain the pauper's attendance, and (unless there is an examination of other

persons in his presence, respecting his settlement, and in whose testimony he acquiesces) to take his examination, yet, I think it does not afford any ground for quashing an order of removal, in a case in which it does not distinctly appear, that the pauper was not *summoned* to give his evidence before the Magistrates. That does not appear in this case, and therefore I am of opinion that the order of Sessions should be quashed, and the case sent back to be re-heard.

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BEST, J. (a)—I can find nothing in the statute of Car. 2, by which the Magistrates are *ordered* to examine the pauper; nor can I find any case in which it is said to be absolutely essential to the validity of an order of removal, that the pauper should be examined. The only authority is that of Lord Holt, C. J. in the anonymous case in *Comberbach*; but so far from saying that the order of removal would be invalid for want of the pauper's examination, all his Lordship says, is, "that if the pauper can be examined, it is fit and proper that he should be examined, but it is not absolutely necessary." This clearly shews, that it could not be the opinion of that learned Judge, that the order of removal would not be good generally, though the pauper was not examined. I am clearly of opinion, that it is not essential to the validity of an order of removal that the pauper should be examined. But I beg to state, that it is the duty of the Magistrates on all occasions, if it is possible, to examine the pauper, because he may know a great number of facts which no other person can know. It is fit, also, in a case in which the interests of the pauper are so materially affected, that he should be called upon, and asked whether he has any thing to allege why the Magistrates should not remove him from the place in which he then

(a) *Helroyd*, J., was absent, at the Old Bailey.

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happens to be resident. This power of the Magistrates to remove is not so great now as it was formerly, for, since Mr. *East's* bill, the Magistrates cannot remove the pauper until he actually becomes chargeable; but before that act, the Magistrates could remove a person likely to become chargeable. The duty of the Magistrates, which I have pointed out, does not affect the validity of the order itself; but the Magistrates should understand, that though we hold this order of removal to be good, yet they are not to make removals without examining the pauper in every case where it is possible. They may expose themselves to great inconvenience, and under certain circumstances render themselves liable to a criminal information; and even if the case should not be of a description which would warrant the Court in granting an information; yet if a pauper has been improperly removed, there can be no doubt that he may maintain an action for any injury he has sustained in consequence of the improper removal. It is therefore extremely important that Magistrates should be on their guard against removing a pauper without just grounds.

Order of Sessions quashed, and the appeal directed to be re-heard.

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The statute
 53 Geo. 3.
 c. 127, substitutes the writ
de contumace
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the old writ *de excommunicato capiendo*, and directs that the former shall be considered in the same way, and be open to the same objections as the latter. Therefore where a defendant was committed by an Ecclesiastical Judge of appeal for contumacy in not paying costs, and the *significavit* only described the suit to be "a certain cause of appeal, and complaint of nullity," without shewing that the defendant was committed for a cause within the jurisdiction of the Spiritual Judge:—Held, that the defendant was entitled to be discharged on *habeas corpus*.

ON shewing cause against a rule nisi, for a *habeas corpus* to bring up the body of this defendant from *Bodmin* gaol, in order to be discharged from a commitment

upon a writ *de contumace capiendo*, under stat. 53 Geo. 3. c. 127, it appeared from the warrant and significavit, that the defendant had been committed by the Ecclesiastical Judge of appeal, for a contempt, in the non-payment of a sum of money, "*upon a certain cause of appeal, and complaint of nullity.*" The principal objection to the commitment was, that it was defective, in not shewing that the defendant was committed for a cause within the jurisdiction of the Ecclesiastical Judge.

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Carter, for the promoters, contended, that this being a commitment in a suit of appeal, this Court was bound to presume that the Ecclesiastical Court had jurisdiction over the matter or cause in which the defendant was guilty of contumacy. It was now too late for the defendant to object to the warrant, that the Ecclesiastical Court had not jurisdiction. If this objection were available, he ought to have moved for a prohibition. Here the warrant was in the usual form in appeal causes, and the Court must necessarily intend that the Ecclesiastical Judge had jurisdiction.

Selwyn, contra. The stat. 53 Geo. 3. c. 127, which substitutes the writ *de contumace capiendo* for the old writ *de excommunicato capiendo*, directs that the former shall be considered in the same way, and be open to the same objections as the latter. Therefore, if the objection taken in this instance is tenable, it is available in this Court, and the defendant is entitled to the benefit of a habeas corpus. Now, the objection to the warrant and significavit is, that it does not appear upon the face of the proceedings that the defendant was committed for a cause over which the Spiritual Court had jurisdiction. It is necessary to give validity to the proceeding, that it should appear upon the face of the warrant of commit-

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ment what the nature of the suit was in the Court of Appeal, in order that this Court may judge whether the Spiritual Judge had jurisdiction or not. Here there is not a single iota indicating that the Ecclesiastical Court had any jurisdiction whatever. The warrant should have gone on to describe the nature of the suit. Merely describing it as "a certain cause of appeal, and complaint of nullity," is not sufficient. He cited *Dr. Watson's case*(a), and *Rex v. Fowler*(b), as authorities in point upon the old writ *de excommunicato capiendo*, and therefore strictly applicable, for the reason already urged, to the present case.

The COURT took time to consider the case, and look into the authorities, and

ABBOTT, C. J. delivered the opinion of the Court:— We are of opinion, that in this case the rule for a *habeas corpus* must be made absolute. The writ *de contumace capiendo* has issued in pursuance of 53 *Geo. 3. c. 127*, by which statute it is directed, that that writ shall be considered in the same way, and be open to the same objections to which the old writ *de excommunicato capiendo* is subjected. There are several cases in the books upon the old writ *de excommunicato capiendo*, which are all applicable to the present case, and the principle to be collected from those decisions is this, that it must appear upon the *significavit* and petition on which the writ issued, if the party has been condemned to pay costs for any contempt whatever, that the subject-matter on which the writ issues has arisen, and is matter apparently within the cognizance of the Ecclesiastical Court. That is the general principle decided in several cases, particularly in *Rex v. Fowler*(c), although it should ap-

(a) 2 *Ld. Raym.* 790. *S. C. Id.*
817. *S. C. 7 Mod.* 117.

(b) 1 *Salk.* 293.
(c) *Id.*

ar that the party was condemned and assessed in an appeal. Our doubt was, whether, as it appears in the present case, that the significavit and condemnation for costs was in a suit of *appeal*, it might not be sufficient, without expressly shewing that the suit was within the spiritual jurisdiction. The case of *Rex v. Fowler* shews, that it was not sufficient, but it does not appear to us that the question arose in that case; for although, on reading the case, it appears that it was in a cause in the Ecclesiastical Court, yet the significavit does not shew that the cause was. The language of the significavit is, that it was in some suit of appeal promoted in the Ecclesiastical Court, in which the defendant was condemned to pay costs. Therefore, though the significavit, in the present case, shews that it was an appeal suit in which the defendant was condemned, yet we think that ought not to operate against this application, which is in favour of personal liberty, and consequently the defendant ought to be discharged. There is also another case *Rex v. Eyre(a)*, which is an authority upon this point. Where the significavit appears to have been on an appeal and complaint of nullity; and the exception was taken to it on the ground, that from a nullity there lies no appeal; but it was answered, that this was the form, and that the exception would not lie; but on looking further to the report of that case, there appears to have been a third exception, namely, that the Judge is made a party, and is condemned in costs. The answer given to that is this, "In this case there could be no other; he *officio* excommunicates a man; that man appeals, and must make somebody a party; there is no promoter, and therefore he cites the Judge: the superior jurisdiction is of opinion he has done the man an injury, and why then should he not pay costs? Lord *Talbot*, in his time, and

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(a) 2 Stra. 1189.

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Lord *Hardwicke* since, upon exceptions to the *significavit*, held it was proper to make him a party, and that he was liable to costs." Now, in that case, the Court might have collected from the *significavit*, that the suit was properly in a matter of ecclesiastical cognizance, and over which the Court of Appeal would have jurisdiction. There is another case in *Strange*, of *Rex v. Eyre*(a), where two *significavits* were quashed, being only said to be in a cause which came by appeal concerning a matter merely spiritual; and Lord Chancellor *Talbot* said, "We are not to lend our assistance but where it appears clearly they have jurisdiction; and are not to trust them to determine what is a matter merely spiritual. It is no more than saying, it is within their jurisdiction, which is never endured. In *Fowler's* case, in *Salk.* 293, it was in *causis jurium ecclesiasticorum*, and held not sufficient." The *significavits* in that case went rather farther than the *significavit* does in the present, for in that they clearly imported that the matter was originally of spiritual jurisdiction; but here, what the original suit was, does not appear. Therefore we cannot say, from the present *significavit*, that the matter before the Court of Appeal was properly matter of ecclesiastical jurisdiction. Not being able to say that this was an appeal in a matter of ecclesiastical jurisdiction, we think the authority last referred to is directly in point, and the defendant must be brought up and discharged.

Rule absolute.

(a) 2 Stra. 1067.

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The KING v. PINNEY and Another.

ON shewing cause against a rule nisi, for quashing an order of Sessions, confirming an order of two Justices, dated 25th *March*, 1823, appointing four persons therein named, to be overseers of the poor of the parish of *Woolwich*, in the county of *Kent*, for the year ensuing; the case was this:—

By a local act, 47 Geo. 3. sess. 2. c. 111, for regulating the affairs of the parish of *Woolwich*, it was enacted, by s. 92, “ that the then overseers of the parish should continue to be overseers for the remainder of the year 1807, and until *two other overseers* should be nominated and appointed, in the manner and at the time by law directed to succeed them; and that in *Easter* week, or within one month after *Easter* in every year, *two persons*, being substantial householders in the said parish, should be nominated and appointed in the manner by law directed, to be overseers of the poor of the said parish;” and two Justices having appointed *four overseers*, the question was, whether such appointment was authorised by the act.

Where a local Act of Parliament, passed for regulating the affairs of the parish of *W.* declared affirmatively, that there should be *two* overseers nominated and appointed to succeed those who were in office at the time of the passing of the Act:—Held, that the Justices might still appoint *four* overseers, under the authority of 43 Eliz. c. 2.

Bolland, (with whom was *Andrews*) in support of the order of Sessions. The statute on which this question arises, does not restrain the discretion of the Justices as to the number of overseers which shall be appointed. Two at least are to be appointed; but there is nothing to prevent the appointment of more. There are no words to be found in the act which take away the power given by the 43 Eliz. c. 2, as to the appointment of overseers. Undoubtedly it was decided in *Rex v. Lordale*(a), that more than four overseers cannot be appointed under the statute of *Eliza-*

(a) 1 Burr. 445.

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beth. The doctrine there laid down is, that as the statute speaks of four, three, or two, it must be taken that the Legislature intended that no more than four, and not less than two, should be appointed, and consequently an order appointing five, could not be valid. Now here, though the local act gives the power of appointing two at least, still there is nothing to prevent the Justices in exercising their discretion by the appointment of four. This is a very large and populous parish, and there is great reason for giving this liberal interpretation to the statute. Before the passing of the act, it is clear that more than two might have been appointed, and unless there are express words to be found, which deprives the Justices of the power given by the statute of *Elizabeth*, this order, appointing four, is perfectly valid.

Scarlett and Adolphus, contra. The argument on the other side proceeds on the supposition, that the words of the local act are "two or more." There is nothing to support that proposition. The statute expressly says, that *two* shall be nominated and appointed; and the 93d section actually refers to the jurisdiction exercised by the Justices under 43 *Eliz.*; so that it limits the power of appointment to the number of two. Therefore if no more than two are to be appointed, it is clear, that an appointment which exceeds that number, must be bad.

ABBOTT, C. J.—The general rule of construction, as laid down by Lord C. B. *Comyn* (a), is, that affirmative words in a later statute, do not repeal a prior statute, unless there is something in the later which necessarily leads one so to understand it. One of the instances given, is this:—"The statute 23 *Eliz.* which gives 20*l.* a month

(a) Com. Dig. tit. *Parliament*, R. 25. Vide *Plow.* 112, 113, and 3 P.Wms. 461.

against a recusant, does not take away the penalty of 12*d.* for every *Sunday*, given by 1 *Eliz.* c. 2. But where affirmative words in sense contain a negative, as where a new ordinance is made, which directs the form or order of the proceedings, it shall be otherwise." If the two cannot be reconciled, the latter must prevail, but if they are not inconsistent, the affirmative words in the later statute do not repeal the former. I see nothing in this statute inconsistent with the 43 *Eliz.* which is the general law of the land, and enables the Justices to appoint four, three, or two overseers. Before the passing of this later statute, the parish of *Woolwich* might have had more than two overseers. The statute says, affirmatively, that there shall be two, and there is a provision that the Justices shall regulate the appointment with reference to the statute of *Elizabeth*. Two, at all events, are to be appointed, but I do not see why the Justices may not appoint four. The statute does not say that there shall be two and no more, or two only; but that there shall be two. The Justices must appoint two; but still I do not see why they may not appoint four.

BAYLEY, J.—This act does not take away from the Justices the power of appointing the same number of overseers, which they might have done had the act not been passed. It is perfectly clear, that before this act they might have appointed four, three, or two. They must have appointed two at the least; and then this act says, that the then present overseers shall continue in office until two be appointed, that is, until two at the least be appointed, and it provides, that in *Easter* week, or within one month afterwards, two persons shall be appointed. It does not say two and no more; but two at the least. There being nothing, therefore, in the act which shews that the intention of the Legislature was to

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confine the number to two, I think we are not warranted in saying that the statute has excluded the power which the Magistrates had of appointing four, three, or two.

BEST, J.(a), concurred.

Rule discharged.

(a) *Holroyd*, J. was absent, in the Bail Court.

Ex parte JOHN SMITH.

A conviction on 45 Geo. 3. c. 121. s. 7, for carrying and conveying foreign brandy in half-ankers alleged to be "then and there liable to forfeiture, the said offence being committed against the provisions of the acts for the prevention of smuggling," is insufficient, in not shewing the particular grounds of forfeiture.

CONVICTION on the 45 Geo. 3. c. 121. s. 7, for carrying and conveying foreign spirits. The conviction, being returned into this Court by certiorari, stated, that on, &c. at *Dover*, &c. *John Smith* had been duly convicted before J. S., &c. of having on, &c. at, &c. (he the said J. S. then and now being a subject of his present Majesty, and being a seaman or seafaring man) being found carrying and conveying, and assisting in the carrying away and conveying, contrary to the form of the statute in that case made and provided, divers, to wit, seven gallons of foreign brandy, in two casks, called "half-ankers," then and there subject and liable to forfeiture, the said offence being by him the said J. S. committed, against the provisions of the Acts of Parliament made and passed for the prevention of smuggling, which offence has been duly proved before the Justices on the oath of one credible witness; concluding with judgment, that the said J. S. had, for such offence, forfeited the sum of 100*l.* pursuant to the 3 Geo. 4. c. 110, &c.

Platt moved to quash the conviction for insufficiency, in not describing any offence for which the defendant was

liable to punishment. The statute on which the conviction is founded, makes it an offence for any person to be found carrying, &c. any foreign brandy, &c. "subject to forfeiture under that act, or any law or act relating to the revenue of customs or excise." The offence described on the face of the conviction is, the carrying and conveying a quantity of brandy "liable to forfeiture;" but it does not state any ground of forfeiture, nor does it refer to any law or statute by which, under the circumstances described, it would be forfeitable. It is quite consistent with this conviction, that the carrying and conveying alleged was an innocent act, or at all events, that it was not punishable under any act relating to smuggling. The conviction therefore, is bad; first, for not shewing that the carriage and conveyance stated was against the form of some specified statute relating to smuggling; and, second, in not shewing that the brandy itself was liable to forfeiture by any statute relating to the revenue of customs or excise.

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Copley, S. G., contra. It is quite clear, that if the conviction had said, that the brandy was liable to forfeiture "under the acts relating to the revenue of customs and excise," it would be free from objection. The question then is, whether the conviction in its present form is not equivalent to that statement. The description of the offence is in having been found carrying and conveying "seven gallons of brandy in two casks, called 'half-makers,' then and there subject and liable to forfeiture, the said offence being by him committed against the provisions of the Acts of Parliament made and passed for the prevention of smuggling." That statement is equivalent to "acts relating to the revenue of customs and excise." The brandy must be liable to forfeiture under some act relating to the revenue of customs or excise. It is so

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stated to be; for the offence is said to be committed against the acts for the prevention of smuggling, and consequently against the acts relating to the revenue of customs or excise. But the statement of the fact that the brandy was carried and conveyed in half-ankers, clearly shews, that it was liable to forfeiture under the statutes for the prevention of smuggling; and it is quite unnecessary to specify under what particular statute it was forfeitable.

ABBOTT, C. J.—I am of opinion that this conviction is bad in form, and must be quashed. The general rule as to convictions is, that the specific fact which forms the ground of forfeiture should be stated, in order that the Court may see that the penalty has been properly imposed, and be quite sure that the convicting Justice has not mistaken the law. If the conviction had stated the circumstances under which the brandy was imported, that it was imported in a certain manner, in casks of a certain size, which was contrary to law, we should then know that the carriage of it on land in such casks would render it liable to forfeiture; but carrying and conveying brandy on land may be liable to forfeiture for various reasons, and therefore it was necessary to shew on the face of this conviction why the brandy in question was forfeitable. It is stated certainly as a fact, that the brandy was contained in two casks, called “half-ankers” but it is not said how it was imported,—that it was imported in those casks. It might have been imported in casks of an hundred gallons, and, having paid the duty, found its way into half-ankers. No fact is given, which plainly imports that the brandy was liable to forfeiture. The general rule I have mentioned, is a sound one, and ought not to be departed from.

BAYLEY, J., concurred.

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HOLROYD, J.—The general rule referred to by my Lord Chief Justice, is equally applicable to convictions on the Game Laws. It is not sufficient, in such cases, to state that the party was not qualified by the laws of the realm to do so and so, though the very words of the Act of Parliament are pursued, but it must appear whether the convicting Justice has drawn the right conclusion from the facts, by negating all the circumstances which are necessary to constitute a qualification. In convictions on the excise or customs laws, if the particular facts and grounds of forfeiture are stated, it is not necessary to name the statute by which the penalty is given, but merely to state that the offence is contrary to the statute in that case made and provided, and the Court will then see whether the Justice has drawn the right conclusion. Now here no sufficient facts are stated to support the conviction (a).

### Conviction quashed (b).

(a) *Best*, J. was absent.

(b) See 3 Geo. 4. c. 110, in which a form of conviction is given.

### ASTLE and Another v. THOMAS and BALDWIN.

**ASSUMPSIT** by plaintiffs, churchwardens of the township of *Burton-upon-Trent*, in the parish of *Burton-upon-Trent*, against defendants, late churchwardens of the

In the parish of *B.*, consisting of the township of *B.*, and several hamlets,

the churchwardens were appointed by the township, and two by the rest of the parish, who made separate rates for their own divisions respectively:—Held, that the acting churchwardens for the township might maintain assumpsit against their predecessors, for a balance remaining in their hands, without joining the other churchwardens as plaintiffs, or defendants, and without proving that their appointment was strictly legal.

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same township, for money had and received to the use of plaintiffs *as such churchwardens*. Plea, by defendant *Thomas*, non assumpsit; and by defendant *Baldwin*, the nonjoinder of two other persons, *I.T.*, and *I.H.* as defendants. Issue on both pleas. At the trial before *Park, J.*, at the last Assizes for the county of *Stafford*, the facts were these:—The parish of *Burton-upon-Trent* consists of the township of *Burton-upon-Trent*, and of several hamlets. The parish has always had four churchwardens, two appointed by the township, and two by the hamlets, jointly. The parish has only one parish church, which is situate within the township. The two sets of churchwardens have always made separate rates. At the time when the defendants went out of office, a balance of £187 was remaining in their hands. *I.T.*, and *I.H.*, were churchwardens for the hamlets during the same period that the defendants were churchwardens for the township. It was objected on the part of the defendants, that the four churchwardens appointed for the parish formed no corporate body, and therefore that the action ought to have been brought by all the present, against all the former churchwardens. The learned Judge, however, overruled the objection, and the plaintiffs, under his direction, obtained a verdict for the balance of 187.

*Campbell* now moved for a new trial, upon the ground, that the learned Judge had mis-directed the Jury in point of law. It must be admitted, that no common fund was ever raised in the parish, and that it was in evidence that the churchwardens for the township, and those for the hamlets, had constantly made separate rates on account of their own respective divisions. But that fact will not authorize either of them in suing, nor will it render them liable to be sued, alone, because it has been decided, that by law there must be one fund for the whole parish, and

that separate bodies of churchwardens, in one parish, cannot legally make separate rates. *Rex v. Gordon* (a). [Bayley, J. That case is materially distinguishable from the present, because the rate there in dispute was a poor rate; there may exist an immemorial custom for a church rate to be raised in a particular way, but there cannot for a poor rate, which has been in existence only since the reign of *Elizabeth*.] Still, the plaintiffs cannot maintain this action, because they sue as churchwardens of the township; there cannot be an appointment of churchwardens for a township; it must be for a parish; consequently, if the plaintiffs have been elected and sworn as officers of the township, they have been legally appointed, and cannot stand before the Court in the character which they have adopted; if, on the other hand, they were appointed for the parish, they have mis-described themselves in the first place, and they should have joined the other two churchwardens as plaintiffs in the action. Upon either view of the case, therefore, the defendants are entitled to a new trial.

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ABBOTT, C. J.—I think we are not at present called upon to decide whether the appointment of these plaintiffs was strictly legal, or not; we are bound to presume that it was until the contrary is clearly shewn. It is in evidence, that the two districts for which the several sets of churchwardens acted kept two separate purses, which were supplied by separate rates, and that there was no common fund in the parish. The parish, therefore, considered at large, has suffered no injury by this sum of money not being paid over, but the injury done is to that portion of the parish, by which, and for the benefit of which, it was raised. It seems to me, therefore, that as the plaintiffs appear clothed with a character which entitles them

(a) 1 B. &amp; A. 524.

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to direct the application of this money, they are the proper persons to maintain an action to recover it from the party who withholds it from them.

BAYLEY, HOLROYD, and BEST, J's. concurred.

Rule refused.

CLARK v. The INHABITANTS of The HUNDRED  
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The owner of stacks of corn maliciously set on fire, may maintain an action against the hundred, on the 9 Geo. 1. c. 22, although he has previously received the full amount of his loss from an insurance office.

**T**HIS was an action on the case, on the statute 9 Geo. 1. c. 22, to recover from the hundred of *Blything*, the value of certain stacks of corn and hay of the plaintiff, which had been wilfully destroyed by fire, within the hundred, by some person or persons unknown. The declaration stated, that the offence was committed within one year before action commenced; that notice of the circumstance was given by plaintiff to three inhabitants of the town of *H.*, which was near to the place where the offence was committed, within ten days after it occurred; that within four days after that notice, plaintiff gave in his examination before a Magistrate of the county, in which he deposed, that the stacks had been set on fire by some person or persons unknown; and that six months and upwards had elapsed, and that the offender or offenders had not yet been apprehended or convicted. "Yet the said inhabitants of the said hundred of *B.* have not, although often requested, made full, or any satisfaction or amends to the said plaintiff for the damage and injury by him sustained as aforesaid, to the damage of the said plaintiff of 200*l.*" Plea, Not Guilty, and issue thereon. At the trial before *Bosanquet*, Serjt. at the last Assizes for the

county of *Suffolk*, evidence was given in support of all the allegations in the declaration, but as it also appeared that the plaintiff's premises and stock, including the property in question, had been insured against fire, and that he had been paid the full amount of his loss by the insurance office, it was contended, on the part of the defendants, that he had no longer any right of action against them. The objection was over-ruled by the learned Serjeant, and the plaintiff had a verdict, with leave to the defendants to move to enter a nonsuit.

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*Storks* now moved accordingly, and renewed the objection. Both the language and policy of the statute upon which this action is grounded, require, that the party shall be suffering a continuing damage at the time when he seeks satisfaction from the hundred; and therefore as the plaintiff had received the full amount of his loss from the insurance office before the action was commenced, he had then ceased to sustain any damage, and it would be a violation of the statute to allow him to recover against these defendants. Section 7, of the act, provides, that the inhabitants of the hundred shall make satisfaction to every person for the damage he shall have sustained by the setting fire to any stack of corn, &c, committed by any offender against that act; so that it is clear, the Legislature intended to afford remuneration to the person actually injured only, and did not contemplate the introduction of any third party, who might previously have insured his property. The 3 Geo. 4. c. 33, the object of which was to regulate the mode of recovering for damage occasioned by offences against the 9 Geo. 1. c. 22, also supports this argument, for in ss. 3 & 4 of that act, the Legislature evidently confine the right of recovery to the individuals whose property is destroyed. It has been decided, that both the 1 Geo. 1,

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stat. 2. c. 5, and the 9 Geo. 1. c. 22, are remedial statutes, and intended to relieve the party damaged by the illegal act. *Ratcliffe v. Eden* (a), and *Hyde v. Coggan* (b). Now here, the party damaged has received satisfaction from the insurers, and it is not competent to them to remunerate themselves by an action against the hundred in his name. It must be admitted, that in *Marshall on Insurance* (c), a MS. case is mentioned under the name of *Mason v. Sainsbury*, which militates against the present argument. That was an action upon the Riot Act; the plaintiff had received the amount of his loss from an insurance office, and this Court certainly held that the insurers might recover from the hundred in his name, though not in their own. That, however, is a solitary case, and does not appear to have received a very solemn decision, and therefore upon a question so comparatively unsettled, and of such vast public importance, the Court will at least think further consideration desirable.

ABBOTT, C. J.—The question upon which the present application depends, was decided in this Court many years ago in the case of *Mason v. Sainsbury*, and unless there is great doubt as to the propriety of that decision, it would not become us now to disturb it. I cannot say that I entertain any doubt as to its propriety. The intention of the Legislature in passing this and the other statutes of the same nature was two-fold; to render the inhabitants of hundreds vigilant for their own sake as well as that of the public, by making them interested in the prevention of offences; and where that is impossible, in the apprehension and conviction of offenders. This particular statute contains provisions which are applicable to both those objects, for section 7 renders the hundred liable to make satisfaction for the injury sustained, and

(a) Cowp. 485. (b) 2 Dougl. 699. (c) Vol. ii. p. 706.

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HOLROYD and BEST, J.'s concurred.

Rule refused.

THIS was an appeal against an order of two Justices, for the allowance of the accounts of the overseers of the poor of the parish of *Kelsale*, in the county of *Suffolk*; which order the Sessions confirmed, subject to the opinion of this Court, upon the following case:—

Quære, Whether able-bodied persons, thrown out of their ordinary employment, and in consequence thereof unable to maintain themselves and fa-

The appellant, Mr. Collett, is the proprietor of a con-

...selves and families, are entitled to parochial relief in money as impotent poor, within the meaning of 43 Eliz. c. 2. s. 1?

It is the bounden duty of overseers to endeavour to find employment, either in or out of their own parish, for able-bodied poor persons thrown out of their usual work; and it seems that it is only in the event of such employment not being to be found, that they are authorized in giving pecuniary relief.

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siderable estate in the parish of *Kelsale*, a part of which is in his own occupation. In consequence of the extreme depression in the price of agricultural produce for the last two or three years, the farmers have been rendered unable to make any improvements on their lands, and consequently have employed very few laborers, by which means a considerable part of the laboring population has been totally unemployed, and during this period, all poor persons belonging to the parish, who have been unable to obtain employment, have received sums of money for their maintenance from the parish officers in proportion to the number of their respective families, for which no labor has been required from them. The appellant being dissatisfied with this application of the parish funds, appealed against the overseers' accounts. The respondents, upon the hearing of this appeal, admitted that the persons to whom the sums objected to in the account were paid, were in fact both able and willing to work, but that no employment could be obtained from them, which the appellant contended, the overseers were bound to provide, pursuant to the statute 43 *Eliz.* c. 2, although no evidence was adduced to prove that the overseers could have employed the laborers. It also appeared, that none of the sums objected to were paid under, or in consequence of, any orders from a Magistrate. The parishioners were accustomed to meet once a week at the parish workhouse, at which meetings all applications for relief were received, and where all laborers belonging to the parish, who had not in the preceding week been in constant employment, attended to give an account of their earnings, and received such sums as, with the earnings, should amount to a sum deemed competent to their maintenance, in proportion to the number of their children. In several cases, it appeared that able-bodied men with four or five children, having had no employment in the preceding week, received

from the overseers from 7s. to 8s. 6d. per week; having been employed three days, 3s. 6d. to 4s. per week; having been employed two days, 5s. per week, and so in proportion to the number of their children, and the amount of their week's earnings. And in all cases this relief was afforded to these persons, solely on the ground of their having been out of employment, without reference or inquiry as to any means they might have of raising money for the supply of their immediate wants by sale or pledge of their household effects; and that in many instances the weekly relief was afforded to various able-bodied laborers for many weeks in succession.

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The case was first argued at the Sittings after last *Trinity* Term, when a question arising whether any of the payments had or had not been made under a Magistrate's order, (which fact did not then appear upon the statement of the case) it was ordered to be sent back to the Sessions for the purpose of being amended, and to stand in the paper for further argument, before the full Court, in the ensuing Term; and

H. Cooper and *B. Andrews*, now appeared to support the order of Sessions. Upon this case, as now amended, there are three questions for the decision of the Court, first, whether able-bodied persons out of employment, and in consequence unable to provide for themselves and families, are entitled to relief at all under the provisions of the 43 *Eliz.* c. 2; second, assuming them to be entitled to relief under such circumstances, whether they are entitled in any other manner than by setting them to work upon a stock of materials to be provided by the parish officers; and third, whether they are entitled to any relief without a specific order from a Magistrate for that purpose. Upon the first point, it is clear, that by

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the 43 *Eliz.* c. 2. s. 1, overseers are empowered to relieve able-bodied persons who are unable to obtain work. That section enacts, that it shall be lawful to raise competent sums of money "for and towards the necessary relief of the lame, *impotent*, old, blind, and such other among them, being poor and not able to work." Now the able-bodied man who cannot find employment, is as much *impotent*, in the fair and ordinary sense of that word, as he who is disabled from working by bodily infirmity; the effect produced upon him is the same; he is reduced to the same necessity for relief; and therefore the proper and natural construction of the word in the Act of Parliament is, that such person is entitled to relief as *impotent*. But there is an express authority for this construction, *Waltham v. Sparks* (a), where it is said by *Eyre, J.* that a person having more children than he can maintain, is *impotent*, as much as if he had been so by lameness. And indeed, any other construction would be equally unjust towards the individual, and injurious to society at large; for the effect of it would be, either to leave the pauper to perish, the victim of distress which he had not occasioned, and could not prevent; or to drive him to the commission of crime, which would eventually burthen the public, first, with the expenses of his prosecution, and next with his maintenance in a prison. Here then, is an express decision in favour of this construction, without any reason or argument against it; and the same view of the subject seems to have been taken by the Legislature in more recent times, for in the preamble of the 8 & 9 *Will. 3.* c. 30, the *want of work* is specifically recognized as a ground for relief; for it says, "forasmuch as many poor persons *chargeable to the parish* where they live, *merely for want of work*, would in any other place, where sufficient employment is to be had, maintain them-

(a) *Skin.* 556. *Comb.* 320. S. C.

and families," and then proceeds to provide the means of obtaining such employment, by authorizing persons to reside in another parish under a certificate.

Again, the 9 Geo. 1. c. 7. s. 1, provides, "that Justices of the Peace shall order relief to any poor person dwelling in any parish, until oath be made before a Justice, of some matter *which he shall judge to be a reasonable cause or ground* for having such relief."

There is no enumeration here of the causes or grounds for relief; the Magistrate is empowered to exercise a discretion upon the subject, and the inference is strong, that any kind of work was intended to be included, because it is possible to say that it is not a reasonable ground for relief.

Upon the second point, overseers may relieve able-bodied persons by other means than obtaining employment for them, or providing a stock of materials and enabling them to work themselves; in other words, they may relieve them *in money*. The old system of providing a stock of materials for the employment of the poor has been for many years disused, except in parishes where a workhouse is maintained. Nor has this been so without reason. In the time of *Elizabeth*, when

the method of providing work was suggested, the articles manufactured by the poor could command a sale; in the present improved state of the manufactures throughout the country, there is no market for such articles, and the money expended in their production would be only a burthen upon the parish, without the least prospect of any return. This change is also warranted by the language of the 43 Eliz. c. 2. s. 1, which evidently gives the overseers a discretion as to the adoption of the method which it suggests; for it is there said, "the churchwardens and overseers shall *'take order,'* from time to time, by and with the consent of two or more Justices of the Peace for the county, for setting to work the chil-

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dren of all such whose parents shall not by the said churchwardens or overseers, or the greater part of them, be thought able to keep and maintain their children; and also for setting to work all such persons, married or unmarried, having no means to maintain them, and use no ordinary and daily trade of life to get their living by." Here is a discretion allowed, first in the overseers, and secondly, in the Justices; for it is clear, that the expression "take order," means, that such persons only shall be set to work as the overseers and Justices shall, in their *discretion* think fit objects for such a plan. But assuming that this statute is imperative in its enactment, still the violation of it cannot deprive the poor of their right to relief; the parish officers may be indicted for their disobedience, but the poor cannot be prejudiced in the interval. On the other hand, the usage has been now for a long series of years established for relieving the poor in money, and that usage has not grown up without strong authority in its favour. If it be illegal to relieve with money those who are entirely out of employment, *à fortiori*, so to relieve those who have employment, but who still cannot earn sufficient for the maintenance of themselves and their families, must be illegal also. But how does the law stand upon this point? By the 9 Geo. 1. c. 7. s. 2, it is provided, "that no officer of any parish shall, (except upon sudden and emergent occasions) bring to the account of the parish, any monies he shall give to any poor person of the same parish, who is not registered in such book or books to be kept by the said parish, as a person entitled to receive collections, on pain of forfeiting the sum of 5*l*." This is a full and unqualified recognition of a then existing right to relieve the poor in "monies," not "monies laid out *for materials*," but money to purchase the necessaries of life; not confined to the persons described in the previous statute of 43 Eliz. c. 2,

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but applied to poor persons generally. A like power is recognized in the 36 Geo. 3. c. 23. s. 1, which declares, "that it shall be lawful for the overseers of any parish, with the approbation of the parishioners, or the majority of them, in vestry or other usual place of meeting assembled, or, with the approbation in writing of any of his Majesty's Justices of the Peace acting for the district, to *distribute and pay* collection and relief to any industrious poor person or persons, at his, her, or their homes, under certain circumstances of temporary illness or distress." It is impossible that the words "distribute and pay" can mean any other than a supply of *money*, and therefore the authority to relieve with money becomes clearly established. Then are able-bodied persons, out of work, proper objects of pecuniary relief, within these statutes? It has been already shewn, that they are so, within the 9 Geo. 1. c. 7. ss. 1 & 2; it only remains to examine the language of the 36 Geo. 3. c. 23, with reference to this case. The persons relieved in this particular parish were undoubtedly persons "under circumstances of distress," for it appears that they had no possible means of subsistence except the relief they received. But was it "temporary distress?" The case indeed finds that some of them were relieved for many weeks successively, but their distress was not therefore the less temporary. The relief was given weekly; it alleviated the distress of one week, and at the expiration of that period a new distress occurred, a new ground for relief presented itself, and new relief was afforded: each week's relief therefore was given to a "temporary distress." Then, upon the third point, overseers may relieve without the order of a Magistrate. To support this position, it is only requisite to refer again to the statute last cited, 36 Geo. 3. c. 23. s. 1. That is in the alternative; the money is to be paid, either "with the approbation of the parishioners," or "with the appro-

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bation in writing of any Justice of the Peace." Now in the present instance, the former of these alternatives has been complied with in the strict letter of the act; for the case finds, that the parishioners met weekly at the work house, and there received applications for relief, and there gave orders for that relief to be administered. As this was the best possible course to be pursued; the parishioners are better judges than the Magistrates can be when, and in what proportions, relief is necessary; as they are the most proper persons to superintend its distribution, because the burthen of the payment rests upon them, and they have at once the strongest interest, and the best opportunities for seeing that the money which they contribute to raise is not misapplied. Upon all the grounds therefore, these accounts were properly allowed and the order of Sessions ought to be confirmed.

Scarlett and Eagle, contra. The mode of relief which gave rise to this appeal, is as manifestly opposed to public policy, as it is decidedly in violation of the law. The 43 *Eliz.* c. 2, does not authorize parish officers to administer pecuniary relief to paupers who are able to work except through the medium of labor, nor is there any prior or subsequent statute which sanctions the practice. An opinion has generally obtained, that the Legislature never interfered to make any provision for the relief and support of the poor, previous to the statute of *Elizabeth*; that is, however, a mistaken idea; there are many statutes long antecedent to the 43 *Eliz.* (a); but in none will it be found that any power is given of relieving with money those who are able to work. That statute certainly comprehends all that preceded it, but upon

(a) Vide 22 H. 8. c. 12. 27 H. 8. c. 25. 1 Edw. 6. c. 3. 3 & 4 Edw. 6. c. 16. 5 & 6 Edw. 6. c. 2. 2 P. & M. c. 5. 5 *Eliz.* c. 1. 14 *Eliz.* c. 5. 18 *Eliz.* c. 3. 39 & 40 *Eliz.* c. 3.

careful review of all the previous acts, no one section or phrase can be discovered, upon which even an hypothesis can be founded, that any description of poor are entitled to relief, but as the reward of labor, excepting only those who are incapacitated from labor, by bodily, or rather physical, infirmity. The 43 *Eliz.* c. 2, seems, however, to have been principally framed upon the 5 *Eliz.* c. 2, the object of which is stated in the preamble to be, "that idle and loitering persons, and valiant beggars, be avoided, and the impotent, feeble, and lame, which are the poor in very deed, should be hereafter relieved and well provided for." It then proceeds to state specifically what relief and provision shall be made for such persons, and how it shall be applied; namely, "that a book shall be kept in which the names of all householders and inhabitants shall be entered, also the names of all such impotent, aged, and needy persons which are not able to live of themselves, nor with their own labor; for them a collection is to be made, and the parson and churchwardens are to appoint two able persons to be gatherers and collectors, and the collection is to be distributed to the said poor and impotent persons, after such sort, that the more impotent may have the more help, and such as can get part of their living, to have the less, and by the discretion of the collectors, to be put in such labor as they be fit and able to do." The import of this passage is perfectly clear, and throws a great light on the whole subject. It shows that the main object and design of the Legislature was, that those who were utterly incapable of work should be supported and maintained by pecuniary aid, and that those who were capable of bodily labor, in however small a degree, should be compelled to perform such work as was within their power. Thus the law stood until the 43 *Eliz.* c. 2. s. 1, which enacted, "that the overseers

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should raise weekly or otherwise, by taxation, a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff, to set the poor on work, and also competent sums of money, for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor and not able to work, and to do and execute all other things, as well for the disposing of the said stock, as otherwise concerning the premises, as to them shall seem convenient." It has been argued that the modes of labor pointed out by this section have *ex necessitate* fallen into disuse, the general improvement in all kinds of manufacture having rendered such a plan no longer practicable. But the statute does not confine the overseers to the adoption of those particular trades which it enumerates; on the contrary, it gives them a general discretionary power to select such others as may be more expedient; and therefore it is their duty, if one department of labor has, by the change of times and manners, become ineffective and unprofitable, to select another, which it is even yet in their power to do. Adhering, however, closely to the letter of this statute, it is by no means necessary to say that the man who is physically capable of work is to be left to perish, merely because he cannot find employment; it is granted that such a man is entitled to relief; it is only insisted that the relief must be through the medium of industrious labor. It has been contended, that under the proper construction of the word "impotent," all those must be comprehended, who are, from any local or external cause, unable to procure employment; and a *dictum* of Eyre, J. in the case of *Waltham v. Sparks* (a), has been relied on. But the *dictum* was wholly extra-judicial, and uncalled for by the case itself, which, upon a close inspection, will not be found by any means to sanction the interference thus at-

(a) Skinner, 556. Comb. 320, S. C.

tempted to be drawn from it. The 43 *Eliz.* c. 2, itself, seems to dictate the opposite conclusion, for in sec. 7, it imposes upon the relatives "of every poor, old, blind, lame, and impotent person, or other poor person not able to work," the burthen of relieving and maintaining such. There are also several cases in which this question has been, if not expressly decided, at least considered in a manner almost conclusive of the construction now contended for. In *Rex v. Gulley (a)*, an order upon a parishioner to maintain his daughter, "being in a poor destitute condition," was held insufficient, for not stating that the pauper was "lame, blind, and unable to work." Again, in the case of a complaint that the pauper was "impotent and deserted," and where the Magistrates made an order upon the father to contribute a weekly sum towards her support, that order was afterwards quashed, because it was not "adjudged" that the pauper was "impotent," *Rex v. Litton (b)*; and both these decisions were afterwards reviewed and confirmed in *Rex v. Haynorth (c)*, *Rex v. Tipper (d)*, and *Rex v. Stoke Ursey (e)*. It is worthy of remark, that the first and seventh sections of the 43 *Eliz.* c. 2, though applying to very different cases, the one to the persons who shall receive pecuniary relief from the overseers, and the other to those who shall be relieved or maintained by their relations, still adopt the same identical words; for the persons described in both are, "the poor, old, blind, lame, and impotent." It has been already shewn by the several cases cited, that an order upon an individual for the maintenance of a pauper is bad, unless it specify that the pauper is "impotent," and therefore it is impossible to suppose that a different rule would be held applicable to an order for

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(a) *Foley*, 47. 1 *Bott*, 366, S.C.(d) 1 *Bott*, 403, note.(b) 1 *Bott*, 366.(e) *Id.* *Ibid.*(c) 1 *Stra.* 10. 1 *Bott*, 402, S.C.

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relief upon overseers. The next succeeding statute is the 13 & 14 Car. 2. c. 12, section 3 of which, after enacting that persons may go into any parish to work, carrying with them a certificate from the parish to which they belong, proceeds thus: "if they shall not return when their work is finished, or shall fall *sick or impotent* whilst they are in the said work, it shall not be accounted a settlement, but they may be removed to the place whence they came; and if the churchwardens and overseers of the poor of the parish to which such persons shall be removed, refuse to receive them, *and to provide work for them*, as other inhabitants of the parish, they shall be subject to indictment." From which two things are clear; first, that the Legislature there used the word "*impotent*" to signify those who were physically incapable of working; and second, that they meant to impose on the parish officers the duty of finding work for those who were not able to find it for themselves. The 8 & 9 W. 3. c. 30, has been cited as a recognition of the title of persons out of work to relief, as such; but it by no means goes that length. It recites, indeed, a melancholy truth, that many persons become chargeable to their parishes for want of work, and directs that such persons shall be supplied with work as the means of obtaining relief, but it does not anywhere confer upon the parish officers the power of relieving in money without first putting the party to work. The whole of that statute seems to proceed upon the principle now contended for, that those who do not work, being able, are not to eat; and the second section studiously, and in terms, lays down that principle, for it declares the object of the former section to be, "that the money raised only for the relief of such as are *as well impotent as poor*, may not be misapplied and consumed by the idle, sturdy, and disorderly beggars;" and, as one mode of identifying the proper objects of relief, directs, that every person being registered in the collection books, and receiv-

ing relief, shall wear a badge, prohibiting the overseers from relieving any person not so wearing a badge, under a penalty of 20s. Antecedent, however, to this statute, was the 3 & 4 *W. & M.* c. 11, in the mis-construction and perversion of which originated the unfortunate system now in operation, and the effects of which are so burthensome to the country. The 11th section of this Act deserves particular observation. It begins by reciting the inconveniences resulting from a misapplication and undue extension of the "power of the churchwardens and overseers of the poor," which it declares to be "contrary to the true intent of" the 43 *Elizabeth*. Now it has already been shewn, that the power of relief given by the 43 *Eliz.* applied to the impotent only. The Statute had several other objects in view, such as the providing work for the poor, the compelling them, by the interposition of the magistrates, to do work, the binding out poor children apprentices, and the raising of rates for the relief and maintenance of the poor; and every one of those acts directed to be done by the co-operation, and consent, and authority of the Magistrates: the only act which it empowered the overseer to do exclusively, and upon their own single authority, was the affording pecuniary relief to the impotent poor. The power thus conferred became abused, and the 11th section of the 3 *W. & M.* c. 11, goes on to prescribe a remedy, and after providing that correct lists shall be from time to time made of the persons entitled to relief, directs, "that no other person be allowed to have or receive collections at the charge of the said parish, but by authority, under the hand of one Justice of Peace residing within such parish, or (if none be there dwelling) in the parts near or next adjoining, or by order of the Justices in their respective Quarter Sessions, except in cases of pestilential diseases, plagues, or small pox, for and in respect of such families only as are or

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shall be therewith infected." The effect of that clause is, that except in the cases specifically excepted, no pecuniary relief shall be given without the consent of the parishioners on the one hand *and* the authority of a Magistrate on the other. Instead of this, the mischievous practice has been, that the pauper applies to a Magistrate, who makes an order for relief as a matter of course, without knowing any thing of the real merits of the case, and without consulting the parishioners, and under that order the overseers act. This is a clear violation of the statute, and it is still more clearly proved to be so, by the 9 Geo. 1. c. 7. s. 1, which, after reciting this very grievance, enacts, "that no Justice of the Peace shall order relief to any poor person dwelling in any parish, until oath be made before such Justice of some matter which he shall judge to be a reasonable cause or ground for having such relief, and that the same person had, by himself, herself, or some other, applied for relief to the parishioners of the parish, at some vestry or other public meeting of the said parishioners, or to two of the overseers of the poor of such parish, and was by them refused to be relieved, and until such Justice hath summoned two of the overseers of the poor to shew cause why such relief should not be given, and the person so summoned hath been heard, or made default to appear." Unfortunately, that section does not require that the Magistrate thus applied to shall be resident within the parish, or its neighbourhood, and that omission has opened wide a door to fraud, because the pauper frequently applies to a Magistrate resident at a great distance, the overseer neglects to appear before him, and thus the order for relief is obtained without any examination of the claim of the party receiving it. But the subsequent parts of this statute are very important, and are evidently in aid of the original design of the 43 Eliz., namely, to secure the

means of finding employment for the poor, instead of relieving them in the first instance with money. Section 4 empowers the parish officers to provide houses, "for the lodging, keeping, maintaining, *and employing*" their poor, and declares that those who refuse to enter the houses shall not receive relief; which is in substance a declaration that the overseers shall not have power to relieve, except by finding employment, and that those poor who are able, but not willing, to work, shall not be entitled to any relief. The 36 Geo. 3. c. 23, in some degree altered the regulations of the 9 Geo. 1., by empowering the overseers to relieve poor persons at their own houses; but with this limitation, namely, "in temporary illness or distress." The want of employment described in the present case, can hardly be called "distress," within the meaning of that clause; but at any rate it cannot be called "temporary distress." The word "temporary" there means sudden and unforeseen distress, and cannot possibly apply to persons who, in the language of the case, are able-bodied laborers," to whom "weekly relief was afforded for many weeks in succession." The 22 Geo. 3. c. 83, may also be referred to, as shewing the unceasing anxiety of the Legislature to relieve the poor by means of employment only; for the 17th section empowers overseers to provide "utensils and materials necessary for their employment;" the 32d points out the mode of providing employment for those poor persons who are unable to procure it themselves; and the 35th authorizes Magistrates "to order the guardian to procure maintenance and employment" for persons so situated. From a review, therefore, of all the Acts of Parliament, the result appears to be this, that it is the duty of the overseers to procure employment for all those who are able to work, and that they cannot legally relieve such persons by any other means. This was the spirit and object of the 43 Eliz.;

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the same spirit and object appears in every subsequent statute; that object has been defeated by the mode of relief pursued by the overseers in this case, and therefore upon that ground these accounts are clearly objectionable, and ought not to have been allowed. [*Bayley, J.*—Suppose the overseers are unable to procure employment for the poor, what course are they then to adopt?] That question does not arise, because it does not appear by the case that these overseers were unable to find employment for the poor, nor even that they made the slightest attempt to obtain it, either in or out of this parish, which it is submitted they ought to do, before they can be authorized to distribute pecuniary relief.

ABBOTT, C. J.—We are of opinion that this case ought to go down again to the Sessions, in order that we may be informed, one way or the other, whether the overseers did or did not endeavour to find employment for the poor of this parish, and whether, notwithstanding their endeavours, they were unable to find work for them. Until that fact appears distinctly on the case, one way or the other, we cannot decide the question intended to be submitted for our consideration. Having said thus much, I wish it, however, to be distinctly understood, that upon a question like this, so deeply affecting the public interest, and upon which the public mind may be so much agitated, we have not as yet pronounced any opinion that parish officers are not bound to afford pecuniary relief to poor persons, for whom no employment can be found. As yet the Court has pronounced no opinion one way or the other upon that point. The only opinion which they give is, that it is the duty of the overseers, in the first instance, if they can, to provide employment for the poor, and I, for one, give that opinion for the sake of the poor themselves, being most perfectly convinced, that it is

more for their advantage that they should maintain themselves by industrious labour, than receive pecuniary relief without employment. Before we can come to any satisfactory judgment upon the question intended to be raised, let us be distinctly informed, whether any and what steps the parish officers have taken, both within and without this parish, to find employment for the poor.

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BAYLEY, J. suggested, that it was the bounden duty of the overseers to obtain work for the poor if they could, either in or out of their own parish, and it was only in case of inability to procure work, that they would be justified in giving relief in money. Probably this very discussion would rouse overseers of the poor to a sense of their duty, in endeavouring to find work for unemployed poor persons. There were several useful modes of employing poor persons, advantageous to the public, such as levelling hills, and improving roads. Within the last few years, a great deal had been done in improving the public highways by this mode of employing poor labourers.

The case was sent back to the Sessions, to be amended.

Ex parte GEORGE RANSLEY.

CONVICTION under 11 Geo. 1. c. 30. s. 16, for knowingly harbouring, keeping, and concealing, and knowingly permitting and suffering to be harboured, kept, and concealed, three gallons and two quarts of foreign spirits, cannot be supported by evidence of finding the smuggled spirits concealed in the house of the party convicted, unless he was present at the time of finding, or some other direct proof be given of a guilty knowledge.

A conviction under 11 Geo. 1, c. 30. s. 16, for knowingly harbouring and concealing smuggled spirits, cannot be

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geneva, being run goods, &c. liable to the duties of excise, whereby defendant had forfeited the same, and also the sum of 100*l*. The conviction having been returned by certiorari into this Court, for the purpose of being quashed for informality, set forth the evidence upon which the convicting Justices acted; from which it appeared, that search having been made in the dwelling-house of the defendant for run goods, a half anker of foreign geneva was found concealed in an inner room therein; that the defendant was not in the house when the search was made, but that his wife was present, and also two men, one of whom instantly left the premises upon the appearance of the searching officers; that the defendant, before the convicting Justices, in answer to the charge, did not produce any evidence, but insisted that the room in which the seizure was made, was detached from his dwelling-house, and had a door always left unlocked; whereupon the Justices found him guilty of the offence charged in the information, and adjudged him to have forfeited as above-mentioned.

Platt now moved to quash the conviction on two grounds; first, that on the face of the conviction there was not sufficient evidence to shew that the defendant had any knowledge of the geneva being in his house at the time of the seizure; and, second, that there was nothing to shew conclusively, that the spirits seized were run goods. The words of the Statute are, "In case any person shall *knowingly* harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, such prohibited goods, or run goods, liable to any duty or duties, &c. shall forfeit, &c." Now, it must be shewn distinctly, first, that the party knowingly harboured, kept, or concealed, or knowingly permitted or suffered to be harboured, kept, or concealed the goods in question, and,

second, that the goods so seized were prohibited, or run goods, liable to the duties of excise. In this case no such proof was set forth on the face of the conviction; on the contrary, the inference from the facts stated is, that the defendant was ignorant of the transaction; for he was not only not present in the house when the goods were seized, but another person was present, whose behaviour pointed him out as the offender, inasmuch as he ran away when the seizing officers made their appearance. Then, secondly, there is no evidence that these spirits were prohibited or run goods. The only ground for such an inference is, that the spirits were contained in a vessel called a half anker. For any thing that appears, that vessel may have been innocently in the defendant's house, and the contrary not being clearly shewn, it cannot be presumed against the defendant.

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Copley, S. G. shewed cause in the first instance. The evidence set out on the face of this conviction is quite sufficient to warrant the decision of the Justices. The goods were found in the defendant's house; upon general principles of law, that was *primâ facie* evidence that he knew they were there, and the onus lay on him to rebut that presumption; he did not rebut it, and therefore it became good evidence upon which to convict him. So, with respect to the second point; the half anker was of itself presumptive proof that the spirits were smuggled, because it is itself an illegal vessel. [*Bayley, J.* It is not mentioned in any of the Acts of Parliament as an illegal vessel.] The quantity that it is known to contain being less than sixty gallons, is by the 23 Geo. 3. c. 70. s. 6, an illegal quantity; but independently of that, the evidence of the liquor being seizable was very strong; it was concealed in an inner room; the man who had the apparent custody of it ran away when the officers appeared; and

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the defendant himself, on his examination, endeavoured to colour the transaction by falsely asserting that the room was detached from his house.

Platt, in support of the motion. The argument in reply to the first point, is answered by *Rex v. Chandler* (a), where *Le Blanc*, J. suggested as an objection fatal to the conviction in that case, that it was not stated that the defendant was either in the house, or near the spot at the time of the transaction. With respect to the half anker, the statute cited does not specify that vessel as illegal, and its illegality cannot be presumed. [*Abbott*, C.J. One section of that statute throws upon the owner of the goods the onus of proving that they are legally in his possession, and in a legal vessel.] The 35th section does throw upon the person claiming restitution of spirits that have been seized, the burthen of proving that the duty has been paid; but the clause was made altogether alio intuitu, and cannot apply to the present case. [*Bayley*, J. Surely the character of the vessel is evidence pro tanto of the character of its contents; and it is clearly illegal to import spirits in so small a quantity as the half anker contains.] Undoubtedly it is, but the mere possession, unexplained of such a vessel, is not illegal.

ABBOTT, C.J.—Upon the whole, we are of opinion as to the first point, that the evidence set out is too slight to found a conviction. The mere naked fact of the spirit being found in the defendant's house during his absence cannot be considered as conclusive evidence of knowledge to support a conviction on this statute. There is abundant ground for suspicion, but we cannot say that it is clear and satisfactory ground to convict. I therefore think that the Justices drew a wrong conclusion.

(a) 14 East, 267. See also *Le Blanc*, J. in *Daniel v. North*, 11 East 372, to the same point.

BAYLEY, J.—There must be some clear and satisfactory evidence that the party knowingly harboured or permitted the spirits to remain in his house.

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HOLROYD and BEST, J.'s concurred.

Conviction quashed (a).

(a) See *Rex v. Hale*, Cowp. 728. *Rex v. Smith*, 8 T. R. 588. *Rex v. Abbott*, Dougl. 553; and *Ex parte Smith*, ante, 126.

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SCARLETT, (with whom was *Alexander*) moved for a rule to shew cause why a mandamus should not issue to the Justices of the Peace for the North Riding of Yorkshire, commanding them to take into consideration a report made by *Martin Stapylton*, Esq. respecting certain abuses in the House of Correction at *Northallerton*, and to take measures for rectifying the same. The affidavit upon which the motion was founded stated, that *Mr. Stapylton*, being a Magistrate for the North Riding of Yorkshire, on the 14th October, 1823, visited the House of

At common law, prisoners committed to gaol for trial, and having no means of supporting themselves in the mean time, are not entitled to any maintenance at the public expense. The 19 Car. 2. c. 4, and 31 Geo. 3. c. 46, require the Justices to provide a stock of materials for the employment of such prisoners, and the 4 Geo. 3. c. 64, authorizes the Justices to set such prisoners to work "with their own consent," in order to maintain themselves. Where a visiting Justice reported to the Sessions, as an abuse, that untried prisoners had been set to work on a machine called the tread-mill, contrary to their own inclinations, and the Sessions thereupon ordered, that such mode of employment should be applied to other prisoners, as well as those sentenced to hard labour; and that those committed for trial, who were able to work, and had the means of employment offered them, by which they might earn their support, but who refused to work, should be allowed bread and water only:—Held, that mandamus would not lie to compel the Justices to order such prisoners any other food; and that in ordering even an allowance of bread and water, they had done more than they were by law bound to do.

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Correction at *Northallerton* in his official capacity, and discovered that several prisoners who had been committed thereto previous to trial had been, contrary to their own inclinations, compelled to work upon the tread-mill; that thereupon he made a report in writing of these facts to the Justices in General Quarter Sessions assembled, and required them to take the same into consideration; that the Justices so assembled accordingly took the same into consideration, but instead of adopting measures to rectify the abuse, made an order that the tread mill should be applicable both as hard labour in the cases of such prisoners as might be sentenced thereto, and for the employment of other prisoners who were not able to work at any trade or other employment; and also that persons committed for trial, who were able to work, and had the means of employment offered them by the visiting Justices, by which they might earn their support, but who should obstinately refuse to work, should be allowed bread and water only. The affidavit further stated, that bread and water, unaccompanied by any other article of food, did not afford sufficient nourishment for the purpose of sustaining human life, and that upon such diet the health of prisoners could not be preserved. Under these circumstances, the Court was called upon to grant a mandamus to compel the Justices to take measures for rectifying this abuse. [*Abbott, C. J.*—You admit that the Sessions have taken the report into consideration; can we then tell them what they are to do? Who are to judge what is proper to be done? This Court, or the Justices of the Peace, in whom the conservation of prison discipline is placed?] This is a matter of great importance, and if it appears to the Court that the Justices have violated the law, the Court will compel them to do what is right. It is submitted that it is contrary to law to compel untried prisoners to labour, whilst in custody previous to trial. By

4 Geo. 4. c. 64, "An Act for consolidating and amending the laws relating to the building, repairing, and regulating of certain Gaols and Houses of Correction in *England* and *Wales*," it is enacted by sec. 17, "that it shall be lawful for any Justice, at his own free will and pleasure, and without being appointed a visitor, to enter into and examine any person, at such time or times, and so often as he shall see fit, and if he shall discover any abuse therein, he is hereby required to report the same in writing, at the next Quarter Sessions, which abuse, so reported, shall be taken into immediate consideration by the Justices at such Quarter Sessions, at which such report shall be made, and they are hereby required to adopt the most effectual measures for inquiring into and rectifying such abuse, as soon as the nature of the case will allow." If, therefore, it appears that the Justices have not complied with the directions of this section, in rectifying the abuse reported, they may be compelled to do so by mandamus. Sec. 10, of the same statute, shews what the law requires to be done on the subject in question. By that section certain rules and regulations are laid down, which are to be observed in all gaols; and by the 13th section it is provided, "that every prisoner maintained at the expense of any county, &c. shall be allowed a sufficient quantity of plain and wholesome food, to be regulated by the Justices in General or Quarter Sessions assembled, regard being had (so far as may relate to convicted prisoners) to the nature of the labour required from or performed by such prisoners, so that the allowance of food may be duly apportioned thereto; and it shall be lawful for the Justices to order for such prisoners of every description, as are not able to work, or being able, cannot procure employment sufficient to maintain themselves by their industry, or who may not be otherwise provided for, such allowance of food as the said Justices shall from time to time think necessary

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for the support of health." Then the 37th section points out in what cases prisoners committed for trial may be set to work.—"And whereas persons are often committed to prison for trial, who are willing to be employed in such work or labour as can be conveniently executed or done in the prison to which they are so committed; and it is fit that such persons should be so employed, rather than that they should be obliged to remain idle during their confinement; Be it enacted, that it shall be lawful for any one or more visiting Justice or Justices of any prison to which this act shall extend, to authorize, by an order in writing, the employment of any such prisoners, *with their own consent*, in any such work or labour, and it shall be lawful for the keeper of such prison to employ such prisoner in such work or labour accordingly, and to pay such prisoner any such wages, or portion of the same, and at such periods as shall be directed by such Justice or Justices; provided always, that it shall not be lawful to place together, on account of such employment, any prisoners who would otherwise be kept separate, under the provisions of this act." Taking, therefore, the 10th and 37th sections together, it is manifest, first, that prisoners who are merely committed for trial, and have not the means of supporting themselves in prison, are to be provided by the county with a sufficient quantity of plain and wholesome food; and second, that the Justices have no power to compel such prisoners to work at the tread-mill, or any other mode of employment, *unless with their own consent*. Whatever may be the expediency or policy of employing persons who are merely committed to prison in order to take their trial, it is contrary to the first principles of law and justice to compel an innocent man (for so the law considers him until he is proved guilty) to undergo the punishment of hard labour, in like manner as if he had been a con-

victed offender. It is clear that the statute now under consideration, does not sanction this principle. If not, then the order which the Justices have made is unlawful, and this Court will compel them to rectify the abuse. The necessary effect of the order is to compel untried prisoners to work against their own inclinations, with this alternative, that if they do not they shall have bread and water only. The order, it is true, does not say they shall be employed on the tread-mill; but if they are incapable of any other work, they must be placed on the tread-mill, or be content with a species of food which it is sworn is insufficient for the sustentation of human life. The 10th section declares, that every prisoner maintained at the expense of the county, shall be allowed a sufficient quantity of "plain and wholesome food." This must mean such quantity and description as is sufficient for the preservation of health. It is sworn, that bread and water is not wholesome food, that is, it is not alone sufficient to sustain human life and health. The question then is, whether an untried prisoner shall be compelled to work against his inclination, or be forced to exist on bread and water only? Suppose the case of a poor man, with no means of supporting himself, is cast into prison for a crime of which he is only suspected, and being thus restrained of his liberty, is he to be compelled to work at the tread-mill against his inclination; and if he refuses, is he to starve on bread and water? By this statute, the county is bound to find such prisoners a sufficient quantity of plain and wholesome food, without regard to the circumstances of their being or not being employed to earn their own maintenance. Bread and water is either insufficient or unwholesome, as it respects the preservation of health. [Abbott, C. J. Who is to judge what is wholesome and sufficient food? The question really comes to that.] That is a question

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of fact. [*Abbott, C. J.*—But who is to decide upon it? Is not that the province of the visiting Justices? *Bayley, J.*—Does your affidavit state any instances in which a diet of bread and water has had any prejudicial effect upon the health of the prisoners?] None, certainly, are mentioned, but it is perfectly notorious, that many of the diseases afflicting the labouring classes, result from a too sparing diet; and it is sworn here, that bread and water, unaccompanied with other articles of food, does not produce sufficient nourishment for the preservation of health. [*Abbott, C. J.*—Can you refer us to any Act of Parliament which makes it compulsory on the county to provide any food for prisoners committed for trial? *Best, J.*—The statute 19 *Car. 2. c. 4*, was passed for the purpose of enabling Justices to provide materials for setting prisoners to work, in order to maintain themselves. The preamble of that act shews clearly, that prior to that time, the county was not bound to provide food to prisoners committed for trial. *Abbott, C. J.*—From the 4 *Geo. 4*, it is by no means clear, that it is compulsory on the county to provide any food for untried prisoners. Section 10 declares, that there shall be certain regulations, which are afterwards set forth. The 13th regulation, upon which reliance is placed, merely says, that “every prisoner maintained,” *i. e.* “every prisoner who is maintained, shall be allowed a sufficient quantity of plain and wholesome food, regard being had to the nature of the labour required or performed by such prisoner,” &c. It does not direct that every prisoner shall be allowed plain and wholesome food, but merely that those prisoners who are maintained, shall have the allowance. That raises a doubt in my mind, whether every prisoner is entitled to support, unless he is not able to work, or being able cannot procure employment sufficient to sustain himself by industry. I find nothing here which says that he must

be maintained at all events, without regard to ill health, or want of employment.] The only statutes bearing upon this point are 19 *Car.* 2. c. 4. 31 *Geo.* 3. c. 46. s. 13. and 4 *Geo.* 4. c. 64. [*Abbott, C. J.* The 31 *Geo.* 3. c. 46. s. 13, only extends the provisions of the 19 *Car.* 2. c. 4, but it does not contain any compulsory provision for the maintenance of prisoners, in idleness, before trial.] Certainly no statute can be found which shews that an untried prisoner shall be maintained at the county expense.

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*ABBOTT, C. J.*—The Court have been anxious to ascertain whether there is any act of the Legislature which renders it compulsory on the county to feed a man in prison who can, but will not work, for the purpose of maintaining himself. At present there does not appear to be any such legislative provision, and if there be not, the Court cannot grant a mandamus to the Justices to do that which by law they are not bound to do. It is clear, that none of the statutes to which we have been referred, imposes this obligation. The preamble of the 19 *Car.* 2. c. 4, recites, that before the passing of that statute, there was not any sufficient provision made for the relief and setting on work of poor and needy persons committed to gaol for felony and other misdemeanors, and that they many times perished before their trial; and that the poor living there, idly and unemployed, became debauched, and came forth instructed in the practices of thievery and lewdness. That statute then, enabled the Justices at Sessions to provide a stock of materials out of the county rate, for setting on work poor prisoners, and to bestow the profits arising from such labour, towards their relief. The 31 *Geo.* 3. c. 46. s. 12, extends the provisions of 19 *Car.* 2, to all prisoners whatever, within the gaols, who may be inclined and willing to work; and by the

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recital in s. 13, it appears that even at that time the  
 soners were frequently so affected by want of necessaries  
 food, as to render them incapable of earning their livelihood  
 when released, and therefore it was enacted, that the  
 Justices at Sessions might order money to be paid out of  
 of the county rate, towards assisting prisoners of that  
 description, who are not able to work, or who, though able,  
 cannot obtain employment sufficient to support themselves  
 by their industry. From these statutes it is manifest, that  
 prior to the recent act of the 4 Geo. 4, there was no legislative  
 provision which made it compulsory on the county to feed a  
 man who is able, but unwilling to work; and that is the point  
 to which we are to look. It is equally obvious, that the 4 Geo. 4,  
 does not cast this burthen on the public. There being, therefore,  
 no legislative provision which compels the county to provide  
 food for those who are able, but refuse to work, we cannot  
 grant a mandamus to compel the Justices to order any species  
 of food to be provided for such prisoners. We cannot take upon  
 ourselves to say, from the facts before us, that the labour of the  
 tread-mill is a proper species of work at which a man may earn  
 his bread; and not being able to find any legislative provision  
 which requires the public to maintain a man who refuses to  
 work when work is proposed for his performance, I see nothing  
 illegal in saying that he shall have only bread and water. I  
 see nothing contrary to this; and not being in disobedience of  
 any legislative provision, we cannot infer that the Magistrates  
 have exceeded their jurisdiction. We ought on every occasion  
 to be exceedingly careful how we interfere with the jurisdiction  
 of the Magistrates. The Legislature has all the discretion to be  
 exercised by them, as to the management of the prisons within  
 their jurisdiction. That discretion is most properly vested in  
 them, and does not

ing to this Court to exercise. We must see plainly they have disregarded some duty imposed upon them law before this Court can interpose, or do any thing to prevent the proper exercise of their discretion. After the legislature has vested this discretion in them, I cannot upon myself to interfere in a matter on which they called upon exclusively to decide.

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BAYLEY, J.—We cannot grant a mandamus to the justices, unless we see distinctly that they have violated their duty. Now, if there be an Act of Parliament, which says, that persons who are capable of maintaining themselves by industry, but will not work, shall have no pecuniary description of support at the expense of the public, we cannot say that the Justices who have ordered them bread and water only, have violated their duty. Where the Justices have ordered the prisoners more than they were bound to do by law.

BEST, J. (a).—It is impossible to grant a mandamus in this case, because the 4 Geo. 4, says, in terms, that it is the duty of the Magistrates, in their discretion, to say what is the proper food to be allowed to the prisoners. If therefore the Magistrates were bound to allow to an idle man any food at all, they would have to exercise their discretion in saying what that food should be; and we could not direct them as to the manner in which their discretion ought to be exercised. If the law imposes a certain duty upon the Magistrates, and they omit to perform it, we may set them in motion. But that is not the case here, where the Magistrates have not only exercised their discretion in this matter, but they have already done more than we could order them to do; namely, in allowing bread and water to persons who have no claim by law

(a) *Holroyd, J.* was in the Bail Court.


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upon public allowance. It appears to me that the Legislature did not mean to place a man in prison in a better situation than the man who is at liberty. He may be placed in as good a situation, but I see no reason why he should be placed in a better. A poor man, out of prison, is only entitled, by the poor laws, to be maintained, if he is able to work, and it is only when he is unable to work that he is to be maintained by the public at all events. If he is able to work, but cannot find none, he is to have work found for him; but if he says he will not work, I know of no law which says that he is to be maintained in idleness. Is a man in gaol to be in a better situation? Being in gaol certainly he cannot so easily find work as a man at large, but the Justices are to find work for him, and afford him the means of earning his livelihood by honest industry. According to 19 *Car. 2. c. 4*, the Magistrates are bound to afford him the means of maintaining himself, and nothing more, and if from obstinate and incorrigible indolence, he refuses to work, he must take the consequences upon himself. The Magistrates in that case are not bound to supply him with food, and maintain him in idleness. I cannot but think that wholesome bread with water is sufficient food for a person who will not do any work; and I am afraid that it has often happened that poor persons out of prison and who are disposed to work and support themselves by honest industry, have not the same comfortable means of living as the Justices in this case seem disposed to afford these idle prisoners. However, whether the quantity or quality of the food be or be not sufficient, is not a matter for us to decide upon. The Justices alone are to judge of that, and having exercised the discretion vested in them by law, we cannot interfere in the manner now proposed.

Scarlett. Is it to be distinctly understood as the decision of the Court, that prisoners committed for trial, and who are determined not to work for their own livelihood, are not entitled to support from the county?

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ABBOTT, C. J.—As yet nothing like a legislative provision has been adduced to us, which renders it compulsory on the Justices to maintain any prisoner in idleness. The statutes brought under our consideration, contain only provisions requiring the county to find prisoners the means of employment.

BEST, J.—It is clear that the common law has made no provision for maintaining prisoners in idleness, and the preamble of the 19 *Car.* 2. c. 4, is a legislative 'declaration of the mischievous consequences resulting from poor persons in prison being kept in a state of idleness.

Rule refused.

END OF MICHAELMAS TERM.

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Wednesday,
February 4.

The KING v. BIGNOLD.

HIS was an indictment against the defendant for alleged perjury, assigned upon an answer to a bill in ancery. At the trial before *Abbott, C. J.*, at the *Midsex* Sitzings after last *Hilary* Term, after the case for the prosecution was closed, the defendant's counsel proceeded to address the jury, and in the course of his address, read some resolutions passed at a meeting of the proprietors of an insurance institution, with which the defendant was connected, and stated certain facts, which he conceived to be material to explain the defendant's conduct in the transaction out of which the prosecution arose; but upon after-consideration he declined producing the resolutions in evidence, or calling witnesses to establish the facts which he had opened. Whereupon, the counsel for the prosecution claimed the right to reply upon the case so opened, and he mentioned a case from memory, where Lord *Kenyon* permitted that privilege to the prosecutor's counsel in consequence of the defendant's counsel having read an advertisement from a newspaper, but afterwards declined putting it in evidence. Upon the authority of that case, and upon principle, the Lord Chief Justice held, that the counsel for the prosecution had a general right of reply upon the defence which had been opened, although the facts and circumstances stated had not been established in evidence. The administration of justice required that such privilege should be allowed; because the statement of facts and circumstances, unsupported by evidence, could not but have an effect upon the minds of the jury. He should put it down as a general rule, that where counsel for a de-

If the counsel for the defendant on the trial of an indictment for a misdemeanour opens new facts in his address to the jury, and afterwards declines calling witnesses to prove the facts so opened, the counsel for the prosecution is, notwithstanding, entitled to a general reply.

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he is to be discharged, and the gaoler is equally in the dark. The conviction and commitment should have ascertained precisely what sum for expenses the defendant was to pay. Let the conviction be quashed and the defendant discharged.

BAYLEY, J.(b) and BEST, J., concurred.

Discharged.

(b) *Holroyd*, J., was sitting in the bail court.

Thursday,
February 5.

Ex parte ALDRIDGE.

The 3 Geo. 4. c. 110. makes it an offence for any person to be found carrying and conveying, &c. uncustomed brandy, and "upon the oath of one or more credible witness or witnesses," the offender is liable to be sent on board a King's ship, if he is fit and able to serve in the navy, and if not, to pay a pecuniary penalty.

Where a conviction stated that R. A. was duly convicted before the

Justice, of having been found "carrying and conveying" brandy liable to seizure, without stating that he had been convicted of that offence "upon the oath of a credible witness:" Held, that the conviction was bad, and the defendant was discharged.

ON a former day a writ of habeas corpus issued to bring up *Robert Aldridge* from the gaol of the borough of *Hastings* in the county of *Kent*, for the purpose of being discharged, on the ground of a defective conviction under the 3 Geo. 4. c. 110. The gaoler now brought up the prisoner, and in his return to the writ set out a warrant of commitment founded on the following conviction, which had been removed by certiorari. "Be it remembered, that on &c. at &c., *Robert Aldridge* hath been duly convicted before me, E. M. one of his Majesty's Justices of the Peace residing near the place where the offence was committed, of having, within three months last past, to wit, on, &c., at, &c., (he the said *Robert Aldridge* then and now being a subject of his present majesty,) been found carrying and conveying and assisting in carrying and conveying, contrary to the form of the statute in that case made and provided, divers, to wit, eight gallons of foreign brandy, then and there lia-

ble to forfeiture, under and by virtue of an act of parliament relating to the revenue of customs and excise in the United Kingdom, for that the said brandy, being goods liable to the payment of customs and other duties, had been then and there unshipped with intention to be laid on land, customs and other duties not being first paid or secured, contrary to the form of the statute, &c. And it is this day *in like manner proved*, on the oath of *Joseph Hancock*, to and before me the said Justice, that the said brandy was then and there, to wit, on &c., at &c., seized and taken from the said *Robert Aldridge*; and that he, the said *Robert Aldridge* (being a subject of his said majesty as aforesaid) was then and there found, taken, stopped, arrested, and detained by one *J. G. F.*; he, the said *J. G. F.*, then and there being an officer of his Majesty's navy, and brought and carried before me the said justice, residing near to the place where the said *Robert Aldridge* was so found, taken, arrested and detained by the said *J. G. F.* as aforesaid; and that the said *Robert Aldridge* is not fit and able to serve in the navy; I do therefore adjudge, that the said *Robert Aldridge* hath, for such offence, forfeited the sum of 100*l.*, pursuant to the act passed in the third year of Geo. 4. entitled, An Act, &c."

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Platt now moved, that the defendant be discharged, on the ground that nothing was shewn on the face of the return to authorize his detention. By the statute the conviction can only take place upon confession, or upon the oath of one or more credible witness or witnesses. Now it does not appear that this conviction has taken place upon the oath of any witness, still less upon the oath of a credible witness. The conviction, it is true, begins by stating, that the prisoner "hath been duly convicted," but that is not sufficient. It must be shewn, that he has
been

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been duly convicted on the oath of a credible witness but no witness whatever is mentioned from whose testimony it appears that the prisoner was found "carry and conveying" the quantity of brandy mentioned, which is the offence, if any has been committed. There is nothing in the remaining part of the conviction to help the objection. The Justice goes on, "and it is this day, *in like manner also proved, on the oath,*" &c. Now there is nothing to which the words "in like manner" can refer, because there was nothing before stated to have been proved on oath, still less was the manner of the proof set out. The conviction says, that the defendant is convicted, but nothing appears to have been proved against him. The offence consists in being in possession of uncustomed brandy at a certain time, but there is no proof that he has been convicted of that offence.

Shepherd, contra. The statute 3 Geo. 4. c. 110. gives a form of conviction, which though it has not been strictly pursued in this instance, still, upon the whole will be found that this conviction is sufficient both in form and substance. When the Justice begins by stating that the defendant has been duly convicted before him the Court will reasonably intend that every requisite of the statute has been observed. Admitting that in part of the conviction no mention is made of the

(a) The form in the schedule to that statute is as follows: "it is remembered, that on the — day of —, in the year, &c. A. B. hath been duly convicted, before me, —, one of his Majesty's justices of the peace, &c. of [*here state the offence*] by him the said A. B. committed against the provisions of the acts of parliament made and passed for the prevention of smuggling; which offence hath been duly proved before me, on the oath of one or more credible witnesses; and the said A. B. being a seafaring man, and able to serve his Majesty in his navy, I do hereby adjudge the said A. B. to serve in his Majesty's naval service, pursuant to an act passed in the third year of King George the Fourth, entitled 'An Act for the better Regulation of the Customs of Great Britain,' &c. Given," &c.

scription of proof by which the offence is substantiated, still what follows cures the defect. The first part of it is merely a description of the offence of which the defendant has been duly convicted, and then the Justice sets out the evidence whereon the conviction has proceeded. The words "in like manner" may be referrible to the words "hath been duly convicted," that is, "in like manner duly convicted on the oath of *Joseph Hancock*." It is manifest, upon taking the whole conviction together, that the offence was proved upon the oath of *Joseph Hancock*; and if that be so, then the conviction is right.

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ABBOTT, C. J.—It is not stated on the face of this conviction to have been proved, *on oath*, that the defendant was found carrying and conveying the brandy in question, and that is the offence alleged against him. All that is said in the beginning of the conviction is, that he has been duly convicted. If the Justice had gone on and said, that it had been proved on oath that the defendant had been found carrying and conveying, it would have been sufficient. Instead of which he states what had been proved. The mere statement that he hath been duly convicted, without shewing that the offence was proved on oath, is not sufficient, and I see nothing to which the words "in like manner" are referrible. It appears to me therefore that this conviction is bad, and the prisoner must be discharged.

BAYLEY, and HOLROYD, Js.(a), concurred.

Discharged.

(a) *Best*, J., was absent.

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The KING v. R. S. COOKE.

*Monday,
February 9.*

An informal
plea in abate-
ment cannot
be quashed on
motion,
though plead-
ed for delay;
it must be de-
murred to.

THIS was an indictment against the defendant, and three other persons, for a conspiracy, to which this defendant pleaded the following plea in abatement :—" And *Richard Stafford Cooke*, Lord *Stafford*, Baron *Stafford*, who is indicted by the name of *Richard Stafford Cooke*, late of the parish of *Castlechurch*, in the county of *Stafford*, gentleman, in his own person comes, and having heard the said indictment read, prays judgment of the said indictment, because he says that on the day of taking the inquisition aforesaid, and long before, he was, and from thence hitherto hath been, and still is, Lord *Stafford*, Baron *Stafford*, and the state, degree, title, and honour of Lord *Stafford*, Baron *Stafford*, on the day of taking the inquisition aforesaid, and long before, had and enjoyed, and still has and enjoys, and this he the said *Richard Stafford Cooke*, &c. is ready to verify, &c. Wherefore, &c." On a former day, *Talfourd* obtained a rule nisi for quashing this plea, on the ground that it was informally pleaded, and pleaded for the mere purpose of delay.

Campbell now shewed cause. It is not pretended that if this plea is well pleaded in point of form, it is not a good plea to this indictment. Then if it be informally pleaded, the proper course for the prosecutors to adopt is to demur; because it is quite unusual to call upon the Court to quash a plea in abatement, for informality. The effect of this application is to deprive the defendant of his writ of error, for if this plea should be quashed, he would have no remedy. No case can be cited on the other side in which the Court has ventured to quash a

plea in abatement. In *Thomas v. Smithies* (a), the Court of Common Pleas refused to quash even a nonsensical plea in abatement, but left the party to sign judgment at his peril. The objection, it seems, to the plea is, that the patent by which the defendant's peerage is created, has not been set out, and that the defendant has not deduced his pedigree from the person under whom he derives his title; but this seems unnecessary, *Rex v. Knowles* (b), *Co. Lit.* 16. b. and n. 3. *Countess of Rutland's case* (c), 2 *Hale's P. C.* 240. But the preliminary objection is, that the Court cannot quash this plea, let it be never so informally pleaded. [*Abbott, C. J.* We are certainly not called upon to decide the sufficiency of the plea; the question is, whether we shall quash it, as being utterly bad. It certainly is a strong measure to quash the plea altogether; we will hear the other side.]

Scarlett and Talfourd contra. The object of this plea is, in the first place, to obtain a different mode of trying the defendant's supposed title to the peerage, than that prescribed by law; and, in the second, to delay public justice. The question is, whether this is a *bonâ fide* plea; for if it be not, the Court, in its discretion, will quash it. In all criminal proceedings, if a plea be bad, or improperly pleaded, the Court, in its discretion, will either quash it on motion, or leave the prosecutor to demur. This discretion is not exercised with reference so much to the degree of informality apparent on the face of the plea, as to the degree of injury and delay by which the purposes of public justice may be affected. With respect to indictments, it is laid down in *Com. Dig. tit. Indictment* (H), that a defective indictment may be quashed upon motion; and there seems no good reason

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(a) 4 Taunt. 668. (b) 1 Ld. Raym. 10. (c) 6 Rep. 53.

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why the same power should not be exercised by the Court with respect to defective pleas. Here is a plea obviously pleaded for delay, and which ought not to be encouraged. In *Rex v. Grainger* (a), the Court quashed a dilatory plea, because there was no affidavit to verify it; this at least is an authority to shew, that the Court does exercise a discretion where the plea is pleaded for delay.

ABBOTT, C. J.—No instance has been mentioned in which the Court has, upon motion, quashed a plea of this description; and I believe none can be found. The case of *Rex v. Grainger* is no authority for this purpose, because the plea there not being verified by affidavit, according to the statute (b), it could not be received at all as a plea. Indictments may be quashed on motion, but the same reason does not apply to pleas, which stand upon a very different footing. Whatever may be our opinion as to the merits or demerits of this plea, we think it too strong a measure to quash it on motion.

The other Judges concurred.

Rule discharged.

(a) 3 Burr. 1617.

(b) 4 and 5 Anne, c. 16. s. 11.

The KING v. MEAD.

Monday,
February 9.

It is a general rule in criminal cases that dying declarations are admissible only

where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration; therefore where a defendant had been convicted of perjury, and had obtained a rule nisi for a new trial, pending which he shot the prosecutor, and on shewing cause against the rule for a new trial, an affidavit of the dying declaration of the prosecutor, relating to the transaction out of which the prosecution for perjury arose was proposed to be read: Held, that it was inadmissible.

INDICTMENT for perjury assigned upon evidence given by the defendant upon the trial of an information in the Court of Exchequer, against a person named *James Law*, whom the defendant had sworn to have been pre-

ent at, and engaged in, a smuggling transaction, at a place called the *Salt Pans*, in the parish of *Scalby*, in the county of *York*, on the 20th *August*, 1820, upon which occasion *Law* was acquitted.

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At the trial before *Abbott*, C. J. at the *Middlesex* Sitings after *Michaelmas* Term, 1822, the defendant was found guilty. In *Hilary* Term last, the Court granted a rule nisi for a new trial, on the motion of the Attorney General, on the ground that the verdict was against the weight of evidence; and also upon affidavits. After the rule was granted, *James Law*, the prosecutor, was killed by a gun-shot wound near his dwelling in *Yorkshire*, and the defendant, *William Mead*, being apprehended and tried at the last *Summer* assizes for *Yorkshire* for that offence, was found guilty of manslaughter.

D. F. Jones (with whom was *Chitty*), on shewing cause now against the rule for a new trial, proposed to read an affidavit of the dying declaration of *James Law*, in which he denied all participation in the smuggling transaction to which *Mead* had deposed in the *Exchequer*; whereupon

Copley, A. G. (with whom were *Clarke*, *Gurney*, and *Walton*), for the defendant, interposed, and objected to the reception of *Law's* dying declaration, on the ground that such declarations are admissible only in cases where the death of the deceased is the subject of inquiry in a court of justice, and where the declaration relates to the immediate circumstances of the death. The declaration now tendered had reference, not to the circumstances under which the deceased came by his death, but to a transaction long antecedent, and consequently could not be admissible as evidence upon an inquiry concerning

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this perjury, which was a matter wholly collateral to the death of the deceased. Upon this principle, it was held in *Doe v. Ridgway* (a), that in the proof of a pedigree, the dying declarations of A. as to the relationship of the lessor of the plaintiff to the person last seised, are not receivable in evidence.

Jones and Chitty contra. The dying declaration of the deceased now proposed to be read is so intimately connected with the subject of the present inquiry, that it cannot be rejected upon the principles contended for on the other side. In Mr. *Phillips's* Treatise on the Law of Evidence, page 200, it is laid down, that the principle upon which evidence of this nature is excepted out of the general rule as to hearsay evidence, is founded partly on the awful situation of the dying person, which is considered to be as powerful over his conscience as the obligation of an oath, and partly on a supposed absence of interest on the verge of the next world, which dispenses with the necessity of cross-examination (b). This principle equally applies to civil as to criminal cases, and cannot be limited to those only where the death of the deceased is the immediate subject of charge against the defendant. This has been laid down in the case of a subscribing witness to a bond, whose dying declarations were allowed to be given in evidence by *Heath, J.* (c) to prove it a forgery; and in *Wright v. Littler* (d), evidence of a dying confession by the subscribing witness to a deed was admitted. So that these are authorities to shew

(a) 4 B. and A. 53.

(b) *Ld. Mohun's* case, 12 How. St. Tr. 949. *Rex v. Reason and Tranter*, 1 Stra. 499. S. C. 16 How. St. Tr. 1. *Tinckler's* case, 1 East, P. C. 354. and 2 Hume's Com. on the Law of Scotland, respecting Crimes, 391. *Woodcock's* case, 2 Leach, Cr. C. 566 and *Bambridge's* case, 17 How. St. Tr. 383.

(c) Cited by Lord *Ellenborough* in *Arison v. Kinnaird*, 6 East, 195.

(d) 3 Burr. 1244.

that the rule contended for on the other side cannot be confined to the narrow limit of an inquiry into the cause or circumstances of the death. But in this case the dying declaration is pertinent and relevant to the matter which is the subject of the indictment for perjury. The circumstances of the death are so connected with the motive for the hostility which the defendant is supposed to have entertained towards the deceased, and depend so much upon each other as not to be separated. The deceased, after giving an account of the manner of his death, proceeds, as a part of the same statement, to negative his having been present at the transaction to which *Mead* deposed in the *Exchequer*, and which was the cause of that angry feeling which led to the fatal catastrophe. The dying declaration, therefore, of the deceased respecting the smuggling transaction is part of the *res gesta*, and may now be received. But, admitting that this declaration could not be received upon the trial itself, still it may be received in the discretion of the Court as to the reasonableness of granting a new trial, on the same principle that the affidavits of parties to the record, both in civil and criminal cases, on motions for new trials, are admitted.

ABBOTT, C. J.—I am of opinion that the affidavit of the dying declaration of this person is not admissible upon this inquiry. I believe it is a general rule that evidence of this description is only admissible where the death of the deceased is the subject of inquiry, and the circumstances of the death are the subject of the dying declaration. There may be exceptions to this general rule; but this is not one. That part of the dying declaration which is relied upon in this case, does not appear to have been made for the purpose of accusing any body, but rather of clearing the deceased himself from the im-

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putation of having been concerned in the smuggling transaction there adverted to; and therefore, on that ground, it is inadmissible. The cases relied upon in the argument for the prosecution are, in their nature, perfectly dissimilar to this, and afford no reason for taking this case out of the general rule, to which I have adverted. In the case before Mr. Justice *Heath*, cited in *Arison v. Kinaird*, the declaration amounted to a confession, by the deceased himself, that he had been guilty of a heinous offence, in having been concerned in forging the bond in question. So also in the case of *Wright v. Littler* the same observation arises. For these reasons, therefore, I am of opinion that this affidavit ought not to be received.

BAYLEY, HOLROYD, and BEST, Js., concurred.

The affidavit was therefore rejected.

Monday,
February 9.

The KING v. RAWSON and others.

Where to an indictment at the Assizes for a misdemeanour, defendants consented to plead guilty, upon an understanding that they were not to be brought up for judgment; and no stipulation having been then made by the prosecutor for the payment of his costs: Held, that he was not afterwards entitled to a rule on the Crown side to have his costs taxed.

THESE defendants had been indicted at the last Assizes for the county of *Lancaster* for a riot and assault. It was arranged with the prosecutor, that if they submitted to a verdict of guilty, they should not be brought up for judgment; and upon that understanding they pleaded guilty accordingly. Since then the prosecutor had obtained a side-bar rule for taxing his costs, although nothing had been said at the Assizes upon the subject of costs.

Scarlett on a former day obtained a rule nisi for discharging that rule on the ground that inasmuch as nothing

for the payment of his costs: Held, that he was not afterwards entitled to a rule on the Crown side to have his costs taxed.

was said at the Assizes upon the subject of costs when the defendants submitted to a verdict, the prosecutor ought not to be suffered now to impose that term upon the defendants. Had the prosecutor stipulated for costs, that might be a different matter.

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Cross, Serjt. now shewed cause against the rule, and insisted that the prosecutor was always considered as being entitled to his costs as a matter of course in cases of this nature. It was implied by one of the conditions of the agreement, that the prosecutor was to have his costs, if he consented not to bring the defendants up for judgment.

PER CURIAM.—It is by no means a matter of course that a prosecutor is entitled to his costs where a defendant submits to a verdict of guilty upon an understanding that he is not to be brought up for judgment. If a prosecutor means to impose that term upon the defendant, it should be made matter of stipulation at the time, or there should be at least some understanding between the parties upon the subject. If a prosecutor, by agreeing not to bring the defendant up for judgment, expects to derive a benefit not usually given to prosecutors, he should take care to have the matter distinctly understood when he enters into the arrangement with the defendant. It does not appear here that the subject of costs was mentioned at all at the Assizes, and we think, therefore, that the prosecutor cannot now call upon the defendants to pay his costs.

Rule absolute.



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The KING v. S. C. MARSH.

A conviction on the 5 *Ann.* c. 14. s. 2. against a common carrier, for having, in that capacity, game in his possession, need not negative the defendant's qualification to kill game; neither is it necessary to aver, that he has the game in his possession "knowingly."

CONVICTION by two Justices against the defendant as a common carrier, for having in that capacity pheasants and partridges in his possession, contrary to the statute 5 *Ann.* c. 14. The record of the conviction was to this effect:

"That on the 8th *November*, 1822, at *Mildenhall*, in the county of *Suffolk*, *E. Fowell*, of &c. came before Sir *H. E. B.* Bt. and *R. E.* Esq. two of the Justices of our Lord the King, in and for the said county, and then and there gave them, the said Justices, to understand and be informed, that within three months last past, viz. on the 25th day of *August*, in the year aforesaid, at the parish of *Elden*, in the county aforesaid, *Samuel Clarke Marsh*, of the city of *Norwich*, and then and there being a common carrier, unlawfully had in his hands and custody and possession as such carrier, divers, to wit, twenty-two partridges and twenty-two pheasants of the game of *England*, such partridges and pheasants not having been sent up nor delivered or entrusted to the said *S. C. M.* as such carrier, as aforesaid, or any wise howsoever by any person or persons in any manner qualified to kill game, contrary to the statute in such case made and provided. And the said *E. F.*, the said informer, prayed that the said *S. C. M.* might be convicted of the said offence above laid to his charge. Whereupon the said *S. C. M.* having been duly summoned in that behalf to answer the said premises before the said Justices afterwards, to wit, on the 14th day of *November*, in the year aforesaid, at *Mildenhall* aforesaid, in the county aforesaid, he, the said *S. C. M.*, appeared and was present before the said

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Justices in pursuance of such summons for that purpose issued, to answer to the said charge contained in the said information; and he, the said *S. C. M.*, having heard the same, was asked by the said Justices if he could say any thing for himself why he, the said *S. C. M.* should not be convicted of the premises above charged as aforesaid, who thereupon pleaded, that he was not guilty of the said offence. Nevertheless on the said 14th day of *November*, at &c. two credible witnesses, to wit, *J. F.* of &c. and *J. M.* of &c., came before the said Justices in their own proper persons, and before the said Justices the said *J. M.* and *J. F.* being respectively then and there, to wit, on &c., duly sworn, &c., the said Justices then and there having full power and authority to administer the said oaths to the said *J. M.* and *J. F.* in that behalf severally deposed, in the presence and hearing of the said *S. C. M.* concerning the premises in the said information specified, as follows, viz. First, the said *J. F.* deposed, &c. that he was turnpike gate-keeper at *Elden* aforesaid; that on the 25th day of *August* then last, and within three months last past, the said *S. C. M.* was, and is, a common carrier, and that the said *J. F.*, on the same day saw the waggon of the said *S. C. M.*, as such common carrier, stopped in the said parish of *Elden*, in the said county of *Suffolk*; that twenty-two live pheasants, two live partridges, and twenty dead ones were then in the said waggon, and in the possession of the said *S. C. M.* as such common carrier, as aforesaid. And the said *J. M.* deposed, &c. that he is keeper to *T. R.* Esq.; that he was present when the said *S. C. M.*'s said waggon was stopped as aforesaid, and that he searched it in consequence of a warrant from the mayor of *Thetford* and by the direction of Mr. *N.* a *Suffolk* magistrate, who was himself then and there present; that he found two hampers and a basket containing divers, to wit, twenty-

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two live pheasants, two live partridges, and twenty dead ones. Whereupon all and singular the matters and things in the said information and evidence contained being by the said *S. C. M.* then heard and fully understood, he, the said *S. C. M.*, was asked by the said Justices what he had to say and offer in his defence against the said information and offence, and in answer to the evidence given as above-mentioned, and what he had to say why he should not be convicted of the premises so charged upon him. And the said *S. C. M.* said, that the said partridges and pheasants so alleged to be found in his said waggon, were put and remained there entirely without his knowledge and consent. And thereupon *J. C.* of *Thetford*, in &c., came before the said Justices on the same day and year aforesaid, at &c., in his own proper person, on the behalf of the said *S. C. M.*, and before the said Justices, being then and there duly sworn, &c., did depose before the said Justices, in the presence and hearing of the said *E. F.*, and of the said *S. C. M.*, concerning the premises in the said information specified as follows, viz. That he was in the employment of the said *S. C. M.* as book-keeper, at *Thetford*, on the 25th day of *August* last; that his said master's waggon stopped on that day at *Thetford* in its way to *London*; that he, the said *J. C.*, saw the waggon about six o'clock in the evening, and it stopped about an hour afterwards; that he saw nothing put into the said waggon except a hamper directed to the Rev. Mr. *B.* at *C.*, which he regularly entered and booked; that the said waggon had been in *Thetford* some time before he saw it, and that he did not know what might have been put into it, before he saw it; that *J. S.* was the driver of the said waggon who was accustomed to drive it; that he had not seen him since that time; that one *Evans* was with the said *J. S.* as helper; that he did not examine the said waggon, nor did he know what was in it; that he did not see any *Norwich*

eigh-bill, nor was he accustomed to see one, unless any
 goods were left at *Thetford*; that the said *S. C. M.* lived
 at *Norwich*, which is his constant residence; that he
 never saw him at *Thetford* to see what was put into his
 waggon; and that it was impossible for the said *S. C. M.*
 his waggoner or book-keeper put any thing into the
 said waggon at *Thetford* or on the road, for him to know
 of it except informed of it; that the said waggon came
 to *Thetford* considerably loaded, but that he, the said
J. C., did not know what was in it; that he was dis-
 missed from his said master's service about a week from
 the 25th day of *August*, on account of the game found in
 the said waggon on the said 25th day of *August*, and he
 had not been since employed by the said *S. C. M.*; that he
 and his father had been book-keepers to the said *S. C. M.*
 for forty years before. And upon hearing and fully un-
 derstanding all and every the matters and things by the
 said *S. C. M.* alleged and proved in his defence, touching
 the premises in the said information specified, inasmuch
 as the said *S. C. M.* hath not adduced any evidence of
 the said pheasants and partridges having been sent as
 aforesaid by any person or persons qualified by the laws
 of this realm to kill or destroy game, or to have the said
 pheasants or partridges in his possession as aforesaid, it
 manifestly appeared to the said Justices that the said
J. C. M. was guilty of the premises above charged upon
 him in the said information, it was therefore adjudged
 by the said Justices, upon the testimony of the said *J. F.*
 and *J. M.* credible witnesses as aforesaid, upon their
 several oaths before the said Justices taken as aforesaid,
 that the said *S. C. M.* on the 25th day of *August* in the
 year aforesaid and within three months last past, at the
 parish of *Elden* aforesaid, in the county of *Suffolk* afore-
 said, not being qualified as aforesaid, or in any manner
 to do, but then and there, being a common carrier,

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unlawfully had in his custody and possession as such carrier aforesaid, the said twenty-two pheasants and twenty-two partridges, the same pheasants and partridges so in the hands of the said *S. C. M.*, not having been sent as aforesaid by any person or persons qualified to kill the game, contrary to the form of the statute in that case made and provided. And thereupon the said Justices, on &c. at &c. did convict the said *S. C. M.* of the offence aforesaid, in and by the said information charged against him, and the said *S. C. M.* was convicted thereby by the said Justices, upon the oaths of two credible witnesses, according to the form of the statute in that case made and provided, and the said Justices did adjudge that the said *S. C. M.* for his offence aforesaid had forfeited the sum of £220 of lawful money of Great Britain, (that is to say,) the sum of 5*l.* for each of the said pheasants and partridges. And they did adjudge that one-half of the said sum of £220 be paid to the said informer, the said *E. F.*, and the other half of the said sum of £220 be paid to the poor of the parish of *Elden* aforesaid, where the said offence was committed according to the form of the statute in that case made and provided. In witness, &c. (*a*)

Scarlett now moved to quash the conviction for two objections; first, that the information does not negative the defendant's being a person qualified to kill game and second, that the information does not aver that the defendant had the game in his possession "knowingly

(*a*) This conviction had been settled by Counsel, in order to raise the questions for the opinion of the Court. When the conviction was drawn up originally, the Justices had omitted to set out the evidence for the defendant, whereupon in *Easter Term* last a mandamus was moved for to command them to set out the evidence on both sides, pursuant to the directions of the statute 3 *Geo. 4. c. 2*. On serving the rule nisi for a mandamus, it was agreed between the parties that that proceeding should be abandoned upon a proper conviction being drawn up, to give the defendant an opportunity of taking the opinion of the Court as above-mentioned. *Vide In Re Rix, post.*

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This being a summary proceeding, by which the defendant is to be convicted of a crime, the Court must not only be satisfied that the case is within the very words, but also within the scope and object of the statute. As to the first objection, it is clear, that if the defendant was a person qualified to kill game, his having the game in his possession, even though in the character of a carrier, would be no offence; and therefore it was necessary that the information should negative his qualification. In convictions upon the statute 5 *Ann.* c. 14. it is the invariable practice to negative the qualifications therein mentioned, and convictions have been frequently quashed for want of such negation. [*Littledale, J.* The only exception in the statute, as it respects carriers, is, "unless such game, in the hands of such carrier, be sent up by person or persons qualified to kill game."] That may be so; but still, if a carrier be qualified to kill game, he may send up the game killed by himself, in his own waggon, and therefore his qualification ought to have been negatived in the information. [*Abbott, C. J.* Then he would not have it in his possession, in his trade and business "*as carrier.*"] At all events this objection is well worthy of consideration. Then, secondly, it ought to be shewn, affirmatively, that the defendant had this game in his possession "*knowingly.*" A guilty knowledge is essential to constitute an offence within this statute. There is certainly nothing in the evidence set out, to shew that the defendant knew that the game was in his waggon, or that the circumstance ever came to his knowledge until after it was seized. Consistently with the evidence it was put into the waggon by his servant without any privity whatever on his part. If that be so, then there is no offence committed, for the master is not answerable for the crime of his servant. Admitting that it may be difficult for the informer to prove knowledge, still it was incumbent on the Justices to state, as

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matter of averment, that the defendant had possession of the game knowingly.

ABBOTT, C.J.—I am of opinion, that, notwithstanding the objections urged, we ought to affirm this conviction. There are two objections taken to the form of the information: first, that it does not negative the defendant being a person qualified to kill game; and second, that it does not aver that he had the game in his possession knowingly. As to the first, I am clearly of opinion that it was quite unnecessary to negative in the information that the defendant was a qualified person; because whether qualified by law to kill game or not, if he had the game in his possession in the way of his trade or business *as a carrier*, he would undoubtedly come within the provisions of this act of parliament; for otherwise we must say that an unqualified carrier is liable, but a carrier who happens to be qualified to kill game is not liable to any penalty, although each does the very same thing. As to the second objection, I am also of opinion, that the information need not have charged the defendant with having the game in his possession as a carrier “knowingly.” The language of the statute is, “if any higler, chapman, *carrier*, &c. shall have in his or their custody or possession any hare, pheasant, partridge, &c. he or they shall, upon conviction, forfeit, &c.” The act does not say “if any carrier shall *knowingly* have;” but “if he shall have;” and we can very easily understand why the legislature did not use the word “knowingly;” because if they had, it would have the effect, in all cases, of casting the burthen on the prosecutors of proving that which would perhaps be incapable of proof, namely, that the master-carrier, who lived at one end of the journey, was privy to every thing that passed on the road during the progress of the waggon to its destination. It would not be sufficient therefore for the carrier, in this

particular instance, to say, "I did not know that the basket of game was put into my waggon; I know nothing about it." I agree that if the carrier could shew that the game had been put into the waggon without his privity, contrary to his orders, and in fraud of him by his servant, for the benefit of the servant only, it would be a valid defence; but that must come from the other side. The question then is, whether there is sufficient stated on the record to sustain this conviction. It is very properly urged, that we are to see whether the evidence adduced on the part of the prosecution shews a *prima facie* case to charge the defendant; for if it does, then the burthen is cast upon the defendant to negative it. The effect of the evidence was for the consideration of the Justices, and not for our judgment. Now the evidence is, that in the course of a journey performed between *Norwich* and *London*, two hampers and a basket containing a considerable quantity of game are found in the defendant's waggon. That is *prima facie* evidence that they are in his possession as a carrier, for they are in that carriage, by which his trade and business as a carrier is conducted. If then there was a *prima facie* case thus made out, has it been rebutted sufficiently for us to say that the defendant was clearly entitled to an acquittal? I am not prepared to say that it was, nor am I at liberty to hold that the Justices have done wrong in the conclusion they have drawn from the evidence. But what does the defendant's case shew? It shews only that some person at *Thetford* did not see the game in the waggon when it stopped at that town. Where and when it was put in was not proved; and, for aught that appeared to the Justices upon the inquiry before them, these hampers and the basket might have been put into the carriage at *Norwich*, and entered in the weigh-bill with other goods, or put into the waggon at some intermediate town or place between *Norwich* and *London*. The defendant might

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have produced the weigh-bill to shew that the fact was not so, or he might have proved many more circumstances in his favour than he did. Not being able to shew that the game was put into the waggon contrary to his order, then that which I consider to be a *prima facie* case was made out by the informer and left unanswered, namely, that he has in his carriage, in the progress of a journey, a quantity of game, which he must be presumed to have in his possession as a carrier, unless he shews the contrary. For these reasons I am of opinion that the conviction must be affirmed.

BAYLEY, J.—I am of the same opinion. The rule as to convictions is this; the information must bring the case within the words of the clause which imposes the penalty, and must negative any qualification, if there be any; but generally speaking, it is sufficient to charge the offence in the language in which the legislature has prohibited it. Now trying this conviction by that rule, it is clearly not necessary to negative a carrier's qualification to kill game, nor to allege knowledge, if game is found in his possession. The words of the statute are, "if any carrier shall have in his possession, &c."; not "if any *unqualified* carrier"; and when the charge is in carrying game from an unqualified person to a given place, the mischief is exactly the same whether the carrier is qualified or unqualified, and therefore there can be no reason for the distinction between a qualified and unqualified carrier. Then as to the averment of knowledge, the clause itself says nothing as to knowledge. If the word "knowingly" had been introduced into the clause, undoubtedly knowledge must have been averred in the information, and some evidence must have been given on the part of the informer to shew the act complained of was committed with the defendant's privity. But in this case I do not think that either such averment or evi-

dence was necessary. It was quite enough for the informer to prove that the defendant, being a carrier, had, in the language of the act, "in his custody or possession," the things prohibited. After such proof it was for the defendant to shew such a degree of ignorance as would excuse him; but that must come by way of defence on his part. It was clearly proved that the game in question was found in the waggon of the defendant. That is *primâ facie* evidence that they were in his custody or possession in his character of carrier. It establishes a *primâ facie* case to be rebutted by the defendant; and in considering how it is to be rebutted we are to attend to the species of evidence which would have been admissible, provided he was really innocent. He only calls one witness from *Thetford*, who says that the waggon came loaded to that place. What it contained he does not know. Then, as far as we can judge, the waggon might at that time have contained the hampers in question. Why then they might have been put in with the knowledge or the authority of the defendant, or they might have been wrongfully put in by his servants without his knowledge. If the latter was the fact, could he not have called somebody from *Norwich* to shew how the waggon was loaded at that place, and satisfy the justices, if he could, that he had been imposed on, and that he was ignorant of any such hampers having been put into the waggon? The weigh-bill would have been a material piece of evidence, but that was not produced. There may be some cases in which the fraud of the waggoner in taking up articles of this description without his master's knowledge would be a protection to the latter, provided it could be made out to the satisfaction of the magistrates. Here the defendant gave no evidence to rebut the *primâ facie* case made out against him, and the magistrates have, in my opinion, drawn the right conclusion.

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LITTLEDALE, J. (a).—I am also of opinion that it was not necessary to negative the defendant's qualification. The second clause of the 5 *Ann.* c. 14. on which the conviction is founded, contains no other exception than this, namely, "unless such game in the hands of such carrier be sent up by person or persons qualified to kill the game." Now this exception is negatived in this conviction. The introduction of that particular exception into the clause shews clearly that whether the carrier be qualified or not to kill the game, still if he has game in his possession, *quà* carrier, he is liable to the penalty, unless he can shew an innocent possession. This clause is not framed like the 5th, which is directed against unqualified persons using dogs or guns to destroy game, in which case it is necessary to negative the qualification in the conviction. Then as to the averment of knowledge: in the first place, I doubt very much whether, upon the general merits of the case, the defendant's knowing or not knowing that the game was in his waggon (except under particular circumstances) would be any defence whatever. I take it to be a general rule that where a thing is done by a man's servant for the benefit of the master, the master is liable for what is done. He is answerable for the publication of a libel by his servant; for a nuisance committed by his servant in the regular course of his employment; and for the sale of things by his servant, which ought to have a stamp, though he has no knowledge of the act done. Perhaps, indeed, if it had been distinctly proved in this case that the master had given directions to his servant to be particularly cautious not to take any game into the waggon, a question might arise whether the master would be criminally answerable or not, if the servant had violated his orders.

(a) *Holroyd*, J. was gone to chambers.

But at all events, the finding the game in his waggon is *prima facie* evidence that he knew it was there. I think, however, in the second place, that it was not necessary to introduce the word "knowingly" into the information, inasmuch as that word is not to be found in that section of the statute upon which the conviction has taken place; and as a general rule, both as to indictments and declarations, it is sufficient to pursue the words of the statute. The words of this statute have been pursued, and that is enough.

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Conviction affirmed (a).

Nolan and *Chitty* were to have argued in support of the conviction.

(a) Vide *Rex v. Stone*, 1 East, 639. and *Rex v. Turner*, 5 M. & S. 206. 1 T. R. 144. and 1 B. & P. 468.



SIMPSON v. ROUTH and others.

ASSUMPSIT for money had and received. Pleas, first, the general issue; and second, a tender, and issue thereon. At the trial before *Holroyd*, J. at the last *Yorkshire* Assizes, the case on the part of the plaintiff was this: The defendants, being overseers of the parish of *Hemmingbrough*, of which the plaintiff was a rated inhabitant, had distrained the goods of the plaintiff, by virtue of the warrant of a Justice of Peace granted to them pursuant to the statute 27 Geo. 2. c. 20. for arrears of poor's rates. The levy and sale were regularly conducted, and after payment of the arrears of rates, and of the expenses attending the distress, &c. a surplus remained in the hands of the defendants, for which the action was brought. It was found by the jury that the

A formal demand is necessary before an action can be maintained against overseers for the surplus arising from a distress for poor's rates, under 27 G. 2. c. 20. s. 2; and a plea of tender, which is found not to cover the plaintiff's demand, will not cure the objection.

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defendants' plea of tender did not cover the whole of the plaintiff's demand, but in fact left a balance of thirteen shillings still due to him. It was contended, however, for the defendants, that the plaintiff must be nonsuited, inasmuch as there had been no formal demand of the surplus before action brought, pursuant to sec. 2. of the statute. The learned judge thought the objection tenable, and nonsuited the plaintiff, with leave to move to enter a verdict for thirteen shillings, if the Court should be of opinion that a formal demand was not necessary.

D. F. Jones now moved accordingly to set aside the nonsuit and enter a verdict for thirteen shillings. It was quite clear that, previous to the passing of the statute, the action would have been maintainable at common law without a demand, and as the statute contained no express provision that a demand should be made, none was now necessary. But if the second section could be construed as implying the necessity of a demand, still it could mean only such a demand as the action itself imported. To call upon a plaintiff under such circumstances to make a formal and specific demand, would be to impose great hardship and inconvenience upon him, because it was out of his power to ascertain what precise sum remained in the hands of the parish officers, whereas they must, from their situation and office, know what the surplus really was, and could not in fact require any information or notice from the plaintiff on that subject. [*Bayley, J.* A general demand of the surplus, if any, might be sufficient, but surely the parish officers are entitled to some notice before they are burdened with the consequences of an action. *Abbott, C. J.* The plaintiff need not be in any uncertainty as to the amount of the surplus, because the statute authorizes him to have a copy of the

account. Besides is it quite so clear that a demand was not necessary at common law before the passing of the act?] *Umphelby v. M'Lean* (a) seems decisive to shew that no notice or demand was requisite, either with or without reference to this act of parliament. [*Bayley, J.* That was a very different case from the present. The action there was founded upon a different act of parliament, and was brought to recover the amount of an excessive charge made by the defendants as tax-collectors, for the expenses of the distress.] The cases in principle are the same; there the defendants improperly withheld a sum of money under the pretence of its having been expended in the costs of the distress; and here the defendants withhold the sum of thirteen shillings, which the plaintiff claims as the surplus in their hands, on pretence that a smaller surplus is in fact due. It was the duty of the defendants, so soon as the account was made up, to pay over the balance to the plaintiff, and "where a mere duty is promised to be paid upon request, no actual request is necessary, but the bringing of the action is a sufficient request." *Birks v. Trippett* (b). Upon this latter authority it is clear that the present action is maintainable.

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ABBOTT, C. J.—It is not necessary to decide how the law stood with reference to the question now raised before the passing of 27 Geo. 2. c. 20. because it is quite clear, from the language of the second section of that act, that a demand of the surplus claimed must be made before the action for the recovery of it is brought. The words are, "the overplus (if any) after such charges, and also the said penalty or sum of money, shall be fully satisfied and paid, shall be returned, *on demand*, to the owner of the goods and chattels so distrained," which

(a) 1 B. &amp; A. 42.

(b) 1 Saund. 32.

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must necessarily apply to a demand made before action brought. Such a provision was quite requisite for the protection of parish officers from unfounded and vexatious suits at law. The party distrained upon may, before the account is made up, remove to a distant part of the country, and then, if no demand were necessary, the only means by which the parish officers could secure themselves from an action, would be to seek out the party at whatever distance, and tender him the overplus, which would be an unjust and insupportable burden. This case does not fall within the rule laid down in the case cited from *Saunders*; for here, until a demand has been made, no duty attaches upon the officers to repay the balance, and consequently no action can lie to recover it. The fact of the tender made by the defendants, does not seem to me to vary the case, because a tender does not confer upon the plaintiff a right of action for a larger sum than that actually tendered, and cannot be construed as an admission of a debt due beyond that sum; but here the plaintiff has declared upon a debt exceeding the amount of the tender. For these reasons I am of opinion that the nonsuit was right.

BAYLEY, J.—I have no doubt upon this act of parliament, that a previous demand was necessary to entitle the plaintiff to recover; and I am very much disposed to say that if there had been no such provision in this act, a demand would have been equally necessary at common law. There is no express contract existing between these parties; there is no duty or obligation resting upon the defendants *ex contractu*. In distraining something more than the precise sum requisite to cover the arrears, the parish officers act from unavoidable necessity, and they are entitled therefore to notice before they are visited with the burdensome consequences of an action. They

are acting in the discharge of a public duty, and are not bound to travel all over *England* to pay over the surplus remaining in their hands. It is said that bringing the action is a sufficient demand. If that be so, then the overseers will always be liable, for levying a farthing more than is due, to pay the costs of the commencement of an action. That would be a most unreasonable proposition. The only difficulty that presses upon my mind arises from the proof of the tender. The object of the legislature in providing that a demand should be made, was to prevent litigation, by enabling the officers to refund the overplus before any action is commenced. Where a demand has been made, it clearly becomes their duty to pay over the whole surplus, and if, without any demand, the defendants thought proper to tender less than was really due, I confess that, as at present advised, it seems to me that no subsequent demand would be necessary, at least for the sum actually tendered. Upon this particular point I entertain considerable doubt, and therefore give no decided opinion; but upon the general question I fully concur with my Lord Chief Justice in thinking that the plaintiff was properly nonsuited.

LITTLEDALE, J.—I think a previous demand of the overplus was necessary to support this action. There was no duty *ex contractu* imposed upon the defendants, arising from the nature of the dealings between the parties; if there had been, the case would have stood on very different grounds. The statute expressly requires a demand. If the defendants had neglected a duty to pay this money which attached upon them *ex contractu*, the action would have been a sufficient demand, even within the statute; but where the defendants owe only a public duty, an actual demand is necessary, in order to make that duty attach. With respect to the tender, I agree

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with my Lord Chief Justice, that it makes no alter in the case, because the tender of a smaller sum i admission of a larger sum being due, as has been rec decided (a). It only admits the defendant's liability pay so much money. On both points, therefore, I cur in thinking that this action is not maintainable.

HOLROYD, J. said he was of the same opinion, added, that at the trial he had at first declined to non in order to give the plaintiff an opportunity of ente into the items of the account, intending to reserve question of formal demand, for the opinion of the Co It appeared, his Lordship said, that the sum tendered refused by the plaintiff, not on the ground of its b too small, but because it was tendered too late.

Rule refused

(a) Vide *Rivers v. Griffiths*. Ante, vol. i. 215.

REED v. The INHABITANTS of the HUNDRED
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To support an action upon the 9 Geo. 1. c. 22. s. 8. against the hundred, for the wilful and malicious destruction of stacks of corn by fire, it is sufficient to give such evidence as may reasonably induce the jury to believe the fire was wilful and malicious. Where a declaration upon this act alleged the tice of the fire to have been given to the *parish*, instead of to the *town, village, hamlet*, as required by the statute: Held, that the objection was cured by the ver

ACTION on the 9 Geo. 1. c. 22. s. 8. against the l dred of *Gainsbury*, in *Somersetshire*, to recover the v of a stack of corn, the property of the plaintiff, alle to have been wilfully, maliciously and feloniously set fire and consumed, by some person or persons unknown to the plaintiff. At the trial before *Bosanquet*, S at the last *Taunton* Assizes, it appeared in evidence,


the stack in question was destroyed by fire, on *Christmas Eve*, 1823. The stack was situate in the angle of an inclosed field, at the junction of two roads, a few yards distant from the highway. No direct evidence was given that the stack was wilfully and maliciously ignited, and the only proof from which a wilful and malicious act could be implied, was, that some of the inhabitants of the neighbourhood, returning home from their *Christmas* festivities, about two in the morning, saw two strange men standing talking together, by a gate which led into the close where the stack was situate. The men were not spoken to by the passengers, but in a short time afterwards the stack was observed to be in flames, and was soon consumed. It was contended, on the part of the defendants, that this evidence was insufficient to go to the jury, to shew that the stack had been wilfully and maliciously set on fire, so as to entitle the plaintiff to recover. The learned judge thought there was sufficient evidence from which the jury might reasonably draw the conclusion that the stack was wilfully set on fire, and left the case to them with that direction. The jury found for the plaintiff, damages £100.

Wilde now moved for a rule to shew cause why there should not be a new trial granted, or why the judgment should not be arrested. In support of the first part of his motion, he contended that there was no evidence from which the jury could reasonably draw the conclusion, that the fire was wilful and malicious. Admitting, that, in support of this action, the same positive and direct proof would not be required as in a prosecution against a person for the felony, still there ought to be such cogent evidence as could leave no room for the jury to doubt that the fire was wilfully and maliciously kindled.

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Now for any thing that appeared, this fire might have arisen from accidental causes, particularly at that season of the year, when the inhabitants of the surrounding neighbourhood were returning, perhaps, with lighted tobacco pipes, from their *Christmas* festivities. No proof whatever was given of the manner in which the fire was kindled. All the evidence was consistent with an innocent cause of misfortune; and in the absence of any proof of an unlawful act, the jury ought not to be directed to draw a conclusion which the evidence could not fairly warrant. The onus lay upon the plaintiff to give, at least, reasonable evidence of a wilful and malicious act, before the hundred could be charged. Then in support of the motion to arrest the judgment, he submitted that the declaration was ill, for not pursuing the language of the statute. The allegation in the declaration was, that notice of the fire was given within two days, to the inhabitants of the *parish*, near the place, &c. instead of the "*town, village, or hamlet*," which are the words of the act. It is quite obvious that the legislature intended that the notice should be given to the inhabitants of a place where there is a congregation of houses, and where the transaction may become immediately notorious, and enable the inhabitants to raise the country by hue and cry upon the felons, if a felony was actually committed. This could not be so well answered, by giving notice to the parish, which is a mere ecclesiastical division, and in which there may be but very few inhabitants. The omission of the word "*parish*" in the statute, shews that the legislature considered a notice to the parish insufficient. It is alleged in the declaration, that the notice was given "*according to the form of the statute*." This was not so, and therefore it is a good objection in arrest of judgment. The statute, though remedial as to the

plaintiff, is strictly penal as to the defendant, and ought to be construed accordingly. *Norris v. The Hundred of Gawtry* (a).

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ABBOTT, C. J.—I am of opinion that there is no ground either for granting a new trial, or for arresting the judgment. In order to support the allegation, that the fire was wilful and malicious, it is not necessary to give distinct and positive evidence of a wilful and malicious act. It is enough, if reasonable evidence be adduced to satisfy the minds of the jury, that it did not arise from an accidental or innocent cause. Under the circumstances of the present case, there is no reason to suppose that the fire proceeded from an internal cause. In another part of the year, if the corn had been stacked in a damp state, or if there had been a storm accompanied with lightning, possibly a fire might have occurred from either of those causes; but considering that this fire took place in the depth of winter, and that the stack was in such a situation that no person passing along the road could, through carelessness or accident, communicate a fire to it, I think there was reasonable evidence from which the jury might presume that the fire was wilful and malicious. Then as to the objection in arrest of judgment, I find that a similar objection was taken and overruled in *Cook v. The Hundredors of Pimhill* (b). In that case, the allegation of notice was “to the inhabitants of the *parish*,” and it was held, that though the act required the notice to be given to the inhabitants of the *town, village, or hamlet*, yet as the law *primâ facie* intends every parish to be a *vill*, unless the contrary be shewn, the allegation was sufficient after verdict, to sustain judgment for the plaintiff. That is an express authority against this motion.

(a) Hob. 139. Vide *Espinasse's Actions on Statutes*, 275, et seq.

(b) 8 East. 173. Vide *Com. Dig. tit. Parish*, (C. 1.) Co. Lit. 125.



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BAYLEY, J.—The position in which the property destroyed was, before the fire took place, must always be taken into consideration by the jury, in determining whether the fire is wilful and malicious, or accidental. The circumstances of this case were quite sufficient to warrant the finding of the jury.

HOLROYD, J.—There was sufficient evidence from which the jury might reasonably draw the conclusion, that the fire was wilful and malicious.

LITTLEDALE, J. concurred.

Rule refused (*a*).

(*a*) Salk. 501. Cro. Jac. 268. 274. 340. 2 Show. 233. and Doug. 681. 3.


The KING v. The INHABITANTS of POLESWORTH.

Where a nephew hired himself to his uncle for three years, at one shilling per day, when he had work for him to do, and when he had not work for him, he was not to be paid, but was to be at liberty to get work from other people, and there was no proof of a service for the whole of any one year: Held, that no settlement was gained as a yearly hired servant.

TWO justices, by an order under their hands and seals, removed *Hannah Brindley*, single woman, from the parish of *Polesworth*, in the county of *Warwick*, to the parish of *St. Peter's, Derby*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case.

The pauper derived her settlement from her father, *William Brindley*, who, being legally settled in the appellant parish of *St. Peter's, Derby*, in *December, 1784*, agreed with one *William Bullers*, his uncle, then resident in the parish of *Polesworth*, to serve him for three years, at one shilling per day, when he had work for him to do, and when he had not work for him, he was not to be paid. *Bullers* told him, at the same time, that he should not have work for him all the year round, parti-

ularly in the winter, or, that when he had not work for him, he might get work from other people. After making the agreement, *William Brindley* went to work in the collieries until the *Spring* of the year 1785, and then went to work with his uncle, according to the agreement, and remained with him about nine months, when his uncle told him he had no employment for him, and he went and worked several weeks with a *Mr. Barrett*, of *Pooly Hall*, as a laboring man. After that interval, his uncle again having work for him, he returned to him, and worked for him about nine months longer, when he quitted him without his leave, and went to *Birmingham*, from whence he never returned to his service. He never received any wages from his uncle when he did no work for him, and never accounted with him for any wages he received from other people when absent from his service. The question for the opinion of the Court is, whether the pauper's father acquired a settlement in *Polesworth*, as a yearly hired servant.

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*Reader*, *Adams*, and *Balguy*, in support of the Order of Sessions. *William Brindley* acquired a settlement in *Polesworth*, by virtue of the hiring and service stated in the case. He was hired by the year, and he was substantially under the control of his master throughout the year. [*Bayley*, J. Did the mutual obligation of master and servant ever exist between the parties; or, was there at any time a hiring for any one year?] The parties clearly stood in the relative situation of master and servant, and the hiring, though for a space of three years, was evidently a yearly hiring. The nephew was legally bound to his uncle for a period of three successive years, and although he was absent for some short intervals, still he was, during the whole of two years, virtually serving his uncle under their agreement. Upon the authority of

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*Rex v. Martham* (a), this may be considered in the nature of a contract of apprenticeship for three years, and there it was held that the pauper gained a settlement by a hiring and service very similar to the present, although there were occasional suspensions of the service, and occasional deductions from the wages. But *Rex v. Chertsey* (b) seems to be precisely parallel in principle with the present case, for it was there held that an agreement by a daughter to live with her father, and to do the offices of a servant for a year, for her board and lodging and other perquisites, was a good hiring for a year, though the daughter was to be at liberty to earn what she could by her labour. *Rex v. Edgmond* (c) will probably be relied on by the other side, but that was decided against the settlement, upon the ground that there were express exceptions in the contract; in which respect, as well as in some others, it is materially distinguishable from this case.

*Gouldburn*, contra, was stopt by the Court.


ABBOTT, C. J.—We must look at the agreement between these parties as a whole, and doing so, it is quite evident that there was no hiring for a year, nor any service under a yearly hiring. The nephew contracted to serve his uncle when there was work for him to do, and the latter contracted to employ him and to pay him wages, when he had work for him to do. But there was an express exception mutually agreed upon, that when there was no work, there should be no service, and no payment of wages, which exception was acted upon for a period of three months in each of the two years. We are not to act upon implication, in the face of the terms of the contract. This case comes directly within the

(a) 1 East, 239.

(b) 2 T. R. 37.

(c) 3 B. & A. 107.

principle of *Rex v. Edgmond*, and other similar cases, and is mainly distinguishable from the other cases cited in argument. Upon the short ground I have already stated, I am clearly of opinion that *William Brindley* gained no settlement in the parish of *Polesworth*, and therefore that the Rule for quashing the Order of Sessions must be made absolute.

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The other judges concurred.

Rule absolute. (a)

(a) Vide *Rex v. Gateshead*, ante, vol. iii. 333. note (b), and *Rex v. Althorne*, id. 375.

The KING v. The INHABITANTS of LYDD.

BY an order of two Justices, *George Goldsmith*, *Elizabeth* his wife, and their two children, were removed from the parish of *Lydd* to the parish of *Thurnham*, both in the county of *Kent*. Upon appeal, the Sessions quashed the order, subject to the opinion of this court upon the following case:—

In the year 1810 the pauper gained a settlement by hiring and service in the parish of *Thurnham*, and on the 26th or 27th of *August*, 1819, he was hired to Mr. *Fisher*, in the parish of *Midley*, for three years at £20 per annum, as looker and to spud thistles. The duty of a looker is to superintend the flocks and fences upon the lands of his employer, and he frequently has several masters, and works for any person who may employ him,

who paid him for it extra by the job, and he also worked for another master as looker when his leisure suited: Held that the relation of master and servant did not subsist between the parties so as to confer a settlement on the pauper.

Where a pauper was hired for three years at £20 a year in capacity of looker, his master telling him at the time the contract was entered into, that he did not think he should have full employment for him; and he served him for three years, during which time he did other work for his master,

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according as his time allows. The pauper served Mr. *Fisher* for three years. He did not work for any person but Mr. *Fisher* for the first year and three quarters of his service, but at the expiration of that time he hired himself as looker to a Mr. *Russell*. During his service with Mr. *Fisher* he did other work for him not belonging to his duty as looker, such as turning mould, lambing, and shearing, for which he was always paid upon new and separate bargains on each occasion, and on other occasions he did day work as a laborer for Mr. *Fisher*, for which he was also paid by the day. At the time of the pauper's contract with Mr. *Fisher* nothing was said about his being at liberty to hire himself to, or to work for other masters during the three years, but Mr. *Fisher* said he did not think he should have full employment for the pauper; he would employ him as far as he could. While he was working for other people his wife hoisted a signal by putting a flag out of the window, upon which he considered himself bound to quit his work and attend his duty as looker to Mr. *Fisher*, for which he was originally hired, and he invariably returned to Mr. *Fisher* when so summoned, and never worked on any lands from whence the flag could not be seen. During the whole of the three years he was not however to do any work for Mr. *Fisher* other than that for which he was originally hired as a looker, without receiving extra wages. His agreement with Mr. *Russell* was by the acre, and he bargained with him for a year at £14. During the whole of the three years he lived on Mr. *Fisher*'s land at *Midley*. The question for the opinion of the Court is, whether the pauper gained a settlement, by hiring and service with Mr. *Fisher*, in the parish of *Midley*.

*Bolland* and *Claridge*, in support of the order of Sessions. The pauper gained a settlement in *Midley* by a

hiring and service in that parish. The Court will confine its attention to the first year of the three for which the contract was made. *Rex v. St. Giles, Reading.*(a) This was not an exceptive hiring, for no exception was mentioned or stipulated for at the time of the hiring. In *Rex v. Chester*(b), the contract was that the pauper should do the offices of a servant for a year for her board and lodging, and should be at liberty to earn what she could by her labor; and a year's service under it was held to confer a settlement. In *Rex v. Ozelworth*(c) the pauper agreed to serve three years, at weekly wages, to work twelve hours per day, and if more, to have a penny per hour over; sixpence per week was to be retained as a deposit, to be repaid to the pauper if he performed the agreement, or if his master should discharge him before the end of the three years, which it was understood he might do at any time. The pauper worked under this agreement first for six, and afterwards for nine months, lodging all that time in his master's parish, and it was held that he thereby gained a settlement in that parish. As far therefore as relates to the circumstance, either of the pauper having occasionally worked for other persons, or of his receiving additional wages from his master upon the contingency of his performing extra work, those cases are authorities for holding that the pauper in this case has acquired a settlement. Again, if this is considered as the case of a customary hiring, there has been both a hiring and a service for a year, sufficient to confer a settlement. *Rex v. Newstead*(d), *Rex v. Navestock*(e), and *Rex v. Horwick*(f). *Rex v. Buckland Denham*(g), may, perhaps, be cited on the other side to shew, that

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(a) Cald. 54.


(e) Burr. S. C. 719.

(b) 2 T. R. 37.

(f) 10 East, 489.

(c) Burr. S. C. 302. 2 Bolt. 361. (g) Burr. S. C. 694.

(d) Burr. S. C. 669.

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where a pauper was hired to work only so many hours per day as it was customary to work in a particular trade, and be at liberty to do what he liked at other hours, no settlement can be gained; but upon looking into that case it will be found, that the ground of the decision there was, that the limitation of the working hours was an express exception in the original contract; in which respect it is quite distinct from the present. Upon these grounds, therefore, it appears, that the pauper gained a settlement in the parish of *Midley*.

*Berens* and *D. Pollock*, contra. In order to the acquisition of a settlement by hiring and service, it is necessary that the master should have the absolute and entire control over the servant during the whole year; but it is quite clear from the statement of this case that Mr. *Fisher* had no such control over the pauper. *Rex v. Horwick* may be admitted as an authority to shew, that a custom for a servant to have *Sunday*, or even some other part of the week to himself, will not defeat a settlement, provided there is no express exception to that effect in the contract; but still it does not by any means govern the present case, because it was expressly stated by Mr. *Fisher* when the pauper was hired, that he should not have full employment for him. It is laid down by *Best, J.* in *Rex v. Edgmond(a)*, that, in order to constitute a sufficient yearly hiring, the master must stipulate for the entire service during the whole year, for the learned judge is there reported to have said, "the master does not, in this case, stipulate for an entire service during the whole year, but only for certain hours during each day; and that, according to *Rex v. Kingswinford(b)*, invalidates the settlement;" and if that is correct law, it

(a) 3 B. and A. 107.

(b) 4 T. R. 219.

is clear that the settlement here is invalidated, for there is nothing like a stipulation here for the entire service of the pauper, but, on the contrary, an express declaration that his entire service will not be wanted. But the very last case decided of *Rex v. Polesworth*<sup>(a)</sup> is directly in point with the present, and is a clear authority for saying that there was no hiring for a year and no service for a year, so as to confer a settlement upon this pauper within the meaning of the statutes.

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ABBOTT, C. J.—I am clearly of opinion that the contract made between these parties is not such as constitutes the necessary relation of master and servant, within the plain and established meaning of the statutes regulating this particular head of settlement. It is quite evident from the facts of the case, that Mr. *Fisher* never stipulated for, and in point of fact never had the control over the pauper, or the right to his entire service, for one whole year. It is therefore impossible to hold that the pauper acquired a settlement by his service under his contract with Mr. *Fisher*, and consequently the rule for quashing the order of Sessions must be made absolute.

BAYLEY, J.—The present appears to me to be in some particulars a new case, but in one respect it is quite of an ordinary nature, and is open to a well-known and decisive objection, namely, that the contract upon which it rests does not constitute a hiring for a year. It is in effect an exceptive hiring, for the pauper is told originally that there will not be full employment for him, and he acts upon that declaration by obtaining work from time to time of other persons. Indeed the very nature of the service, as stated in the case, shews that the

(a) *Ante*, p. 202.



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master could not have intended to contract for the exclusive service of the pauper, because it is impossible that such an employment could fairly occupy the whole time or call forth the entire labor of any ordinary servant. I entirely concur in the opinion that no settlement was acquired by the pauper in the parish of *Midley*.

LITTLEDALE, J.(a)—*Rex v. Horwick* is the only case cited which bears any resemblance to, or forms any authority for, the present, and even that is distinguishable from it in one important particular; for there, the pauper was provided with full and fair employment by one and the same master; whereas here, the work done cannot possibly be rated as the entire service of any husbandman, and the pauper actually resorts to other employers to fill up the measure of his labor and to augment the sum of his wages. Upon the grounds already detailed by the Court, I am also of opinion that the order of Sessions must be quashed.

Rule absolute for quashing the order of Sessions.

(a) *Holroyd*, J. was sitting in the Bail Court.

### THE KING v. THE INHABITANTS OF HALLOW.

Where a servant under a yearly hiring served for eleven months and two days,

and was then committed to and imprisoned in the House of Correction for one month under 20 G. 2. c. 19. for misbehaviour, at the instance of the master: Held that the commitment and imprisonment were no dissolution of the contract, or such an interruption of the service as to prevent a settlement, although the servant received no wages for the time he was in custody.

BY an order of two justices, *Thomas Hewitt*, *Elizabeth* his wife, and their two children, were removed from the parish of *Powick* to the parish of *Hallow*, both in the county of *Worcester*. On appeal, the Sessions confirmed

the order, subject to the opinion of this Court upon the following case:

The pauper, *Thomas Hewitt*, gained a settlement in the parish of *Hallow*, about fourteen years since, by a hiring and service for a year in that parish. At the expiration of that service, he entered into the service of one *John Price*, in the parish of *Tibberton*, also in the county of *Worcester*, having been previously hired by him at *Pershore Mop*, a few days before old *Michaelmas*, (when his service at *Hallow* expired) to serve him as waggoner's boy from the said old *Michaelmas* to the old *Michaelmas* following, at the wages of £5. The pauper went into the service of *Price*, according to that hiring, and remained with him, serving him in the parish of *Tibberton*, till about a month before the old *Michaelmas* day, at which his service was to end, when disputes having arisen between his master and him, in consequence of his master having charged him with misconduct, he was summoned by his master before Mr. *Gresley*, a magistrate of the county, on the 15th *September*, 1809, to answer that charge. Upon hearing the complaint, it was agreed, between the magistrate and *Price*, that the pauper should either beg his master's pardon, and be received back into his service, or, if he refused to beg his pardon, that he should remain the rest of his year in prison. The pauper refused to beg *Price's* pardon, and was thereupon committed to the House of Correction, by virtue of a warrant of commitment which stated, that "Whereas, complaint hath been made before me, *P. G. Esq.* one, &c., upon the oath of *John Price*, of *Tibberton*, that *Thomas Hewitt*, servant of the said *J. P.* in husbandry, hath committed divers misdemeanors against him his master, and particularly by leaving the service of his said master on *Wednesday* last, and absenting himself

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therefrom the whole of such day, whereby the said J. P. lost the service of one of his teams such day, having no other person to drive the same: And whereas upon due examination, &c. the said T. H. is and stands convicted before me of the said offence, I do hereby," &c., concluding in the ordinary form, with a commitment "for the space of one calendar month from the date hereof." The warrant bore date the 15th September, 1809. The year for which the pauper had been hired by Price expired two days before the expiration of the calendar month for which he was committed. The pauper remained in prison during the whole of the said calendar month, and at the expiration of it was discharged. During the time of his imprisonment the pauper's clothes remained at the house of Price, in Tibberton, and when the pauper left the prison, he went to Price's house and took away his clothes, and received from Price all his wages except seven shillings, which Price deducted for the time the pauper had been in prison, and he then quitted the house. The question for the opinion of the Court is, whether there was a sufficient service for a year by the pauper under the last mentioned hiring to give him a settlement at Tibberton, subsequent to the settlement of the pauper at Hallow.

Russell and Ryan, in support of the order of Sessions. The question in this case is, whether, during the period which the pauper passed in prison, he can be considered as continuing in the service of his master, which, it is contended, he cannot. The actual service was unquestionably incomplete, and the circumstances are not such as will warrant the Court in holding that the actual deficiency was made up by an implied service. Now, in order to confer a settlement upon this pauper, he must

have rendered either an actual or implied service for an entire year. *Rex v. Barton-upon-Irwill* (a) will probably be cited on the other side to shew that there was no dissolution of the contract between the parties, and therefore that the service continued during the imprisonment of the servant. That case, however, is distinguishable from the present. There the servant returned to his master after the expiration of his imprisonment, was received by him, and continued to serve under the original contract; here, the servant does not return to the service after his imprisonment, nor ever serves again under the contract. — [Bayley, J. The pauper's being sent to prison was, in substance, the act of his master, and, therefore that did not dissolve the previously existing relation of master and servant.]—Unless there was some subsequent act of the master to shew that he intended only to dispense with the last month's service, the sending the servant to prison did operate as a dissolution of the contract. Now there was no such act, for the pauper never returned to the service, and the relation of master and servant was never revived between him and Mr. Price; there is therefore no evidence of a dispensation here. In *Rex v. North Cray* (b), where the servant was committed before the end of his year for not giving security respecting a bastard child, and the master was overseer, and had been active in his commitment, and afterwards deducted out of his wages on account of his absence, the Court held it to be a dissolution.—[Bayley, J. Is this case distinguishable from *Rex v. Barton-upon-Irwill*? There *Le Blanc*, J. said “It is said indeed that there was an interruption of the service, but during the whole time he (the pauper) was subject to his master. It was under the authority of the contract that his master acted, when he punished him for misconduct; therefore it was not a dissolution. The master might,

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(b) Cald. 495.

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perhaps, have elected to dissolve it, but he has not done so. Neither do I think this was an interruption of the service to prevent a settlement."] The ground upon which the Court there decided that there was neither a dissolution of the contract, nor an interruption of the service, was, that the pauper returned to the service after his imprisonment, and in that important particular the present case differs from that. But it is perhaps not necessary to contend that there was a dissolution of the contract here; it is enough to shew that there was no dispensation of the last month's service, and then there is clearly an interruption of the service, so as to defeat the settlement. By the 8 and 9 W. 3. c. 30. the person claiming a settlement by hiring and service must "continue and abide in the same service during the space of one whole year," which this pauper certainly has not done. The 20 G. 2. c. 19. s. 2. which empowers magistrates to punish servants for misconduct, either by commitment to the House of Correction, or by abating some part of their wages, or by discharging them from their service, will be relied on by the other side, but it does not help this case. The language of the warrant shews that the pauper was committed for a default in his service; how then can it possibly be argued that a residence in prison as a punishment for not performing his service, was either an actual or an implied service by the pauper? *Pawlett v. Burnham* (a) is an authority for saying that an interruption or discontinuance of the service is sufficient to defeat a settlement, and as there was no dispensation by the master of the last month's service, and no actual or implied service by the pauper during that time, the service is incomplete, and no settlement has been gained under it.

(a) 2 Bott. 300. See *Rex v. Westerleigh*, Burr. S. C. 753. and *Rex v. Winchcombe*, Doug. 391.

*Nolan*, (with whom was *Shutt*,) contra, relied upon the 20 Geo. 2. c. 19. s. 2., contending that by resorting to that statute for the purpose of punishing the servant, the master had consented to dispense with the actual performance of the residue of the service, but that by operation of law the contract remained undissolved, and the residence in prison was an implied performance, sufficient to confer a settlement. He was proceeding to distinguish this case from those cited, when he was stopt by the Court.

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ABBOTT, C. J.—I am of opinion that there was a complete service by the pauper in this case for one whole year, sufficient to confer upon him a settlement in the parish of *Tibberton*, and consequently that the order of Sessions, confirming the order of removal to the parish of *Hallow*, must be quashed. The object of the 20 Geo. 2. c. 19. was to enable masters to punish their servants for misconduct, *in their character of servants*. It does, indeed, empower magistrates, in their discretion, to discharge the servant from his service, and thereby to dissolve the contract; but where the magistrate and the master, as in this case, jointly elect to punish the servant by imprisonment, the plain object of the statute would be defeated, if we were to hold that the contract was dissolved, or the service discontinued, by the imprisonment. It appears to me that, by construction of law, the pauper was “abiding and continuing” in his master’s service during the period of his imprisonment, and therefore that he has performed his full year’s service under the contract, and has thereby acquired a settlement.

BAYLEY, J.—I think the principles laid down by *Le Blanc*, J., in *Rex v. Barton-upon-Irwill* (a), and to which

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I have already alluded, fully govern the present case; and it is very important in this branch of the law to adhere as closely as we can to former decisions, and to avoid nice and subtle distinctions. The pauper was committed at the suggestion of his master. Previous to his commitment it is not disputed that the relation of master and servant subsisted between them. Therefore the labor performed by the pauper in the House of Correction was, by construction of law, and in my opinion according to common sense also, service done by him in the character of a servant for his master. It seems to me to be perfectly unimportant at what period of the service the imprisonment took place, whether in the last month, or in the middle of the term; nor do I think that the fact of the pauper's not returning to the service varies the case. As the imprisonment ended about the time of the expiration of the year contracted for, neither party was bound to renew the contract; and if it had ended before the expiration of the year, each party would have been bound by law to perform the residue of it: the servant must have returned to his service, and the master must have received him.

HOLROYD, J.—I am satisfied that by operation of law the relation of master and servant continued to subsist between these parties, as well during the imprisonment of the pauper as before. The neglect of actual service during the last month was occasioned by the act of the master, and did not arise out of any criminal offence of the pauper, for which he might have been discharged from his service. By the election of the master himself he is not discharged; the contract therefore was not dissolved, and the service continued; and whether it was performed about the master's affairs, or in the shape of labor imposed as a punishment, is immaterial.

LITLEDALE, J.—The master in this case made his election to punish the servant, and not to turn him away; therefore the imprisonment suggested by him, and assented to by the magistrate, could not operate as a dissolution of the contract. The absence of the servant was not wilful, nor superinduced by any voluntary act of his, but was rendered unavoidable by the compulsory act of his master. The labor performed in the House of Correction, therefore, was virtual service under the contract, and the yearly service having been thus completed, the pauper is entitled to his settlement.

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TWO Justices, by their order, removed *Hannah Stain*, single-woman, from the parish of *Fleckney* to the parish of *Market Bosworth*, both in the county of *Leicester*. On appeal, the Sessions confirmed the order, subject to the opinion of this Court upon the following case:

The pauper was hired by, and lived with, *Mrs. Worthington*, in the appellant parish, from *Shrove Tuesday*, 1821, until old *Michaelmas* day following. Three weeks before the last mentioned day *Mrs. Worthington* asked the pauper "to stay again;" to which she replied, that

about wages. They agreed for 3*l.* 10*s.*, and one shilling earnest was paid, but nothing was then said as to the time the service was to continue. A fortnight before old *Michaelmas* the mistress said to her, "I have hired you, but mentioned no time; remember you are hired for fifty-one weeks;" to which the servant replied, "Very well." The servant lived with her mistress for a year under this agreement. She had three days holidays at *Christmas*, and four other days at different times afterwards, and at the end of the year received her wages: Held, that this was a yearly hiring and service to confer a settlement.

A mistress hired a servant from *Shrove Tuesday* until old *Michaelmas* day following, and three weeks before the latter day asked her to "stay again;" to which the servant replied, she had no objection, if they could agree



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she had no objection, if they could agree about wages. They agreed for 3*l.* 10*s.*, and one shilling earnest was paid. At the hiring nothing was said as to the time the pauper was to serve. There was no interval between the first and second service. A fortnight before old *Michaelmas* her mistress said to her, "Hannah, I have hired you, but mentioned no time; remember you are hired for fifty-one weeks." To this the pauper answered, "Very well." The pauper lived with Mrs. *Worthington* until old *Michaelmas* day, 1823. She asked to have her week just before *Christmas*. Mrs. *Worthington* said, "You shall have three or four days now; I cannot spare you the whole week." She staid away three successive days and nights then, and had the other four days at different times during the year, returning on each of them to sleep at her mistress's; and her mistress gave her two or three holidays besides. She never was absent without her mistress's permission, and always returned into the service, and at the end of the year received her wages. The question for the opinion of the Court, is, whether the pauper acquired a settlement in the parish of *Market Bosworth*, by the hiring and service above stated.

*Reader*, *Hildyard*, and *Humfrey*, in support of the order of Sessions. The Sessions have done right in confirming the order of removal. It is impossible to imagine a clearer case of hiring and service for a year than this. The subsequent declaration of the mistress, though assented to by the pauper, does not alter the original yearly hiring, and the week's absence then agreed upon and ultimately had, was merely a dispensation of so much service, and not an exception in the contract. *Rex v. Sulgrave* (a) is an authority to that point, and

(a) 2 T. R. 376. See *Rex v. Milwich*, Burr. S. C. 433. *Rex v. Macclesfield*, 3 T. R. 76. and *Rex v. Mursley*, 1 T. R. 694.

applies directly to the present case. The conduct of the parties is conclusive, to shew that each understood and intended the original hiring for a year to remain unaltered; for the pauper stays her full year, and receives her full amount of wages when the year expires; and the mistress exercises her right to the service throughout the year, by dictating the periods at which the servant was to be absent, according to her own choice or convenience. Besides, upon the evidence stated in the case, the question before the Sessions was one of fraud, which, as was said by *Buller, J.*, in *Rex v. Fillongley (a)*, "is open to the Sessions in every case as it arises. It is the peculiar jurisdiction of the Justices, and not of this Court, to say, whether the particular case be fraudulent or not." Upon either ground, therefore, the Court will feel themselves bound to confirm this order of removal.

*G. Marriott and Clinton*, contra, endeavoured to distinguish this case from *Rex v. Sulgrave*, contending that here the original contract was dissolved, and a new hiring for 51 weeks agreed upon by the parties, whereas in that case there was only a dispensation of the service for a part of the time originally contracted for.

**BAYLEY, J. (b)**—Whether, upon the facts of a case, there has been a dissolution of the contract, or a dispensation of the service, and whether there has or has not been fraud in the transaction, are, generally speaking, questions for the Justices at Sessions to decide; and when they have decided them, the general rule is, that this Court will not interfere. But when the Sessions entertain doubt upon any particular case, and it has been brought before us at considerable expense in conse-

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(a) 1 T. R. 458.

(b) Abbott, C. J. was gone to Guildhall.

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quence, it is competent, and indeed proper, for us to give our opinion upon it. I am of opinion, that the pauper in this case has gained a settlement by hiring and service in the parish of *Market Bosworth*, because it seems to me, either that there was a dispensation of a week's service, or that the second contract was tainted with fraud. In order to decide whether there has been a dispensation of a portion of the service, it is important to consider whether the service has been rendered incomplete by the act or request of the master, or of the servant. The requisites to confer a settlement by hiring and service, are, a hiring for a year, a complete service for a year, and a service under a yearly hiring. I am of opinion that all these requisites have been complied with here, and that there was a dispensation of one week's service by the pauper's mistress. The first conversation, in which the mistress asked the pauper "to stay again," and the pauper consented to stay, was a general hiring, and therefore by construction of law, a hiring for a year. The agreement between the parties was then complete, and earnest was paid in ratification of it. But, it is said, that agreement was dissolved or altered by the subsequent conversation. The conduct of parties, however, frequently expresses their intentions more clearly than their words, and the subsequent conduct of these parties from the moment of the second conversation up to the close of the year, seems to me to prove most clearly that no bona fide alteration was made, or was even intended to be made, in the original agreement. Then, if this be a correct conclusion from the facts stated, *Rex v. Sulgrave* (a) comes in as an authority expressly in point, and in conformity with that decision we must hold, in point of law, that there has been a settlement gained by

(a) 3 T. R. 376.

this hiring and service. In *Easter Term*, 1817, there was another case decided, which in principle also bears on this, namely, *Rex v. Coggeshall* (b). I am therefore clearly of opinion that the Order of Sessions must be confirmed.

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HOLROYD, and LITTLEDALE, Js. concurred.

Order of Sessions confirmed.

(b) 6 M. & S. not yet in print.

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The KING v. The INHABITANTS of NORTHWEALD  
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BY an order of two Justices *Melicent Reynolds*, widow, and her six children, were removed from the parish of *Northweald Bassett* to the parish of *Magdalen Laver*, both in the same county. The Sessions, on appeal, quashed the order, subject to the opinion of this Court, on the following case :


*Richard Reynolds*, the husband of the pauper *Melicent Reynolds*, died in *May*, 1822, seised of a freehold estate liable to dower in *Northweald Bassett*. Dower was not barred, but it has not been assigned, nor have any steps been taken for that purpose. The heir at law has been from the time of his birth an idiot, and at *Richard Reynolds's* death was about twenty-one years of age. This estate had been devised to *Richard Reynolds* by his mother, who died more than twenty years ago, and situated before she had resided forty days: Held, that as the dower had not been assigned, she had not such an interest in the parish as to render her irremovable from what could be called *her own*.

Where a widow entitled to dower [which was unassigned] upon her husband's estate which had been mortgaged by him for a thousand years, and after receiving her dower upon one half-year's rent from the mortgagee in possession, she became chargeable to the parish, in which the property was

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who by her will left several legacies, but it did not appear in evidence whether those legacies had been satisfied or not. In the year 1820, long after the marriage of *Richard* and *Melicent*, the estate had been mortgaged for a term of one thousand years by *Richard* to secure the payment of 100*l.* The mortgagee has received the half-year's rent which accrued since the death of *Richard* at *Michaelmas* last, out of which he paid the sum of 3*l.* to the pauper *Melicent*, and took from her the following receipt:

“The 7th *December*, 1822. Received of the heir-at-law of my late husband *Richard Reynolds*, deceased, the sum of three pounds by the payment of *Richard Houchin* the tenant, being my third share (as his widow) of the half-year's rent of the freehold part of his estate on *Thornwood Common* in *Northweald Bassett*, due *Michaelmas* last.”

	£.	s.	d.	
“The half-year's rent	11	10	0	The Mark of  <i>Melicent Reynolds.</i> ”
“The half-year's interest on mortgage . .	2	10	0	
	9	0	0	
“Mrs. Reynolds's third	3	0	0	


Richard Reynolds lived in *Magdalen Laver*. After his death, his widow, the pauper, resided in that parish for some months, and then hired and lived in a cottage in *Northweald Bassett* which was not on the husband's estate. Before a residence of forty days had been completed in that parish she became chargeable, and was removed by an order of Justices. The Sessions were of opinion that she was irremovable and quashed the order. The question for the opinion of the Court is, whether the pauper was removable from *Northweald Bassett*?

Brodrick and *H. I. Stephen* in support of the order of Sessions. The pauper's right to dower, although unassigned, gave her such an interest in land in the parish of *Northweald Bassett*, as rendered her irremoveable, notwithstanding she had not completed her residence for forty days at the time she became chargeable. According to Lord *Ellenborough's* language in *Rex v. Horsley*(a), "she had at least so much colour of right to reside in the parish, without being removed, as to exempt her residence from being considered as a vagrant intrusion into a parish in which the party has nothing of her own within the purview and scope of the poor laws." It is not necessary to contend, that if the pauper had resided forty days she would have gained a settlement in *Northweald Bassett*; it is sufficient to shew that she had at all events such an interest in the parish as took away the power of the Justices to remove her under the stat. 13 and 14 *Car. 2. c. 12.* She was clearly not of that description of vagrant intruders against whom that statute was directed. The case of *Rex v. Horsley*, already cited, is a strong authority in support of this argument. In that case it was decided, after solemn deliberation, that a sole next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing forty days in the same parish after the intestate's death, before administration granted to her; and it matters not that the widow of the intestate survived him, if she died afterwards without having taken out administration, leaving the other, sole next of kin to the intestate. There is no doubt in the present case that the pauper is entitled to dower, and though it may not have been formally assigned, yet that circumstance will make no difference as it respects the

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(a) 3 East, 405.

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present argument. Here there has been a bonâ fide payment of £3 to her, and she has had the actual enjoyment of it, and consequently had such an interest as entitled her to remain in the parish. This case is perfectly distinguishable from *Rex v. Berkswell* (a), where the pauper had no right whatever to reside, being merely an intruder in point of law, and consequently could gain no settlement by a residence of forty days. It is unnecessary to cite cases to show that the party need not reside upon the property in respect of which the interest arises; so long as the residence is in the same parish. *Rex v. Sowton* (b), *Rex v. St. Nyotts* (c), are authorities to that effect. The case which will be relied upon on the other side is *Rex v. Painswick* (d), in which it was decided, that although a mere right of dower without an assignment will gain a widow a settlement by a residence of forty days, yet it is not that sort of interest which will communicate itself to a second husband, and confer a settlement upon him and the children of the second marriage, because a tenant in dower has no right to *enter* till dower is assigned. But the main reason for the decision of the court in that case was, that the mere right of dower was not like the case of a next of kin, "who cannot acquire a settlement *before* administration granted." Now the Court will observe what the state of the law was when that decision took place. At that time no case had decided that a sole next of kin was irremoveable before administration granted; but since then *Rex v. Horsley* has expressly determined the affirmative of that proposition. As the whole foundation then of *Rex v. Painswick* was the supposition already alluded to, it follows that if a sole next of kin is irre-

(a) *Ante*, vol. i. 467.

(b) 1 Burr. S. C. 125.

(c) 1 Burr. S. C. 132.


(d) *Id.* 783.

moveable, so is a dowress whose dower is unassigned, [BAYLEY, J.—Suppose the pauper in this instance could gain a settlement by a residence of forty days, if the parish officers had allowed her to reside so long, had they not a right to remove her, if chargeable in the mean time?] Certainly not, upon the principle that she was not removeable from her own. *Rex v. Horsley*, it is submitted, makes out that proposition, and shews that *Rex v. Painswick* is not to be considered as an authority governing the present question. The reason why a tenant in dower has no right to enter until dower is assigned, is founded upon public convenience, which will not allow a widow to carve for herself; and in all the cases upon this subject, it is said, that without assignment she would be a trespasser if she entered. *Bac. Ab. tit. Dower*, [D]. Still, however, her right to dower may be perfect without assignment, which is a mere form which the law has prescribed to consummate her title. In the *Duke of Hamilton v. Lord Mohun* (a), it is said, “As to the want of a formal assignment of dower, that is nothing in equity; for still the right in conscience is the same; and if the heir brings a bill against the mother for an account of profits, it is most just that a Court of Equity should, in the account, allow a third of the profits for the right of dower.” The statutes 18 Geo. 2. c. 18. s. 5. and 20 Geo. 3. c. 17. s. 12. which relate to the right of voting at elections, treat the assignment of dower as a mere ceremony. But it may be contended in this case, that in point of fact there has been a valid assignment of dower to this pauper. According to the facts stated in the case, the husband mortgages the estate for a term of 1,000 years, to secure the repayment of 100*l.* subject to the remote and almost

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nominal reversionary interest of the heir, who is an idiot, and who consequently cannot execute an assignment. The mortgagee is the person in whom the whole present interest is vested, and he pays a certain sum of money to the widow as her dower, and which sum is accepted by her as such. [*Abbott, C. J.* How could his payments of the dower prejudice the rights of the heir?] In *Co. Lit.* 34 b. it is laid down, first, that dower may be assigned by the tenant by consent and agreement; second, that an assignment of dower requires neither livery of seisin, nor writing, but may be by parol, because it is due by common right; and third, that it may be by a rent issuing out of the land as well as by parceling out the land by metes and bounds. [*Abbott, C. J.* Here there is no tenant of the land. A mortgagee in fee would be tenant of the land, but here there is no such tenant.] Conceding that there was no good assignment of dower in this case, still the pauper's right to dower gives her such an interest in this parish, as renders her irremoveable, and therefore the order of Sessions must be affirmed.

Marryat (with whom was *Jessopp* and *Knox*) contra. It is perfectly clear that there was no assignment of dower in this case, and therefore, dower unassigned, is not such an estate as will either confer a settlement, or prevent the pauper from being removed. Undoubtedly a person may be irremoveable without having acquired settlement, but that is upon the principle that the party is irremoveable "from *his own*." That is the language of the law in a numerous class of cases. The case of *Rex v. Horsley* does not vary the proposition, because there the party had a right to the property as sole next of kin, and had by statute the entire equitable interest until administration was taken out, and nobody else could have

taken out administration without her concurrence. In all the decisions upon the head of settlement by estate, the pauper must have the *right of possession*. That was the very principle upon which *Rex v. Berkswell*, cited on the other side, was decided. In the present case, the pauper had no legal right of possession until there was a valid assignment of her dower, and if she attempted to enter, she would be a trespasser. The legal title to the freehold was in the heir, who alone had the right of possession, subject to the widow's dower, which may be assigned either by himself, by the sheriff, or by any of the other modes prescribed by law. The answer to the argument on the other side is, that here the pauper had nothing *of her own*, from which it can be said she was irremovable. *Rex v. Painswick* is a decisive authority to shew, that without an assignment of dower, the widow had no estate in the land which can be called her own.


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Here the Court stopped him.

ABBOTT, C. J.—As it is agreed on both sides, that there was in fact no assignment of dower, I am clearly of opinion that the pauper in this case had not any such interest as would entitle her to the possession of any part of the estate as her own, so as to render her irremovable. *Rex v. Painswick* seems to be a decisive authority; and as that case has never been impeached by any subsequent decision, I think we are bound by it, and consequently the order of Sessions must be quashed.

BAYLEY, J.—There being an express decision on the point, unless we could see that that decision was wrong, we ought to abide by it. *The King v. Painswick* is, I think, a decisive authority upon this question. Here the

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pauper would never have a right of occupation; for so long as the thousand years term continued, the right of occupation would be in the termor, and whatever right she might have, could only be by assignment, which in fact has never taken place. In *Rex v. Painswick* the widow, after her husband's death, continued residing on the property, and there was a clear possession for forty days. The Court there decided, that, inasmuch as it was a legal right of possession in her, under the statute of *Magna Charta*, by which the widow would be irremovable for forty days, she might therefore gain a settlement. She afterwards continued to reside upon the property, and she married again, and she and her second husband lived upon it for about two years. Now if the right of dower unassigned would confer a settlement to the party who was residing upon the estate out of which the dower was to issue, the husband would have been irremovable during the whole of that time. The question in that case was, whether the children of the second marriage were settled in the parish in which the mother and father had so resided; and the Court held that they were not. Why? Because the right to have dower assigned, and residing upon the estate on which the mother was entitled to have dower assigned, was not sufficient to communicate a settlement to the husband and the children, the dower not having been, in point of fact, actually assigned. That case is precisely like this in principle, and we ought to be bound by it.

HOLROYD, J.—I think the decision in *Rex v. Painswick* is decisive of the present case, unless we could see that it was determined upon a wrong principle. We should not be authorized in disturbing it, unless there was reason to doubt the propriety of it. I see no reason for saying that it is wrongly decided, and therefore on the

authority of that case I am of opinion that we ought to quash this order.

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LITTLEDALE, J. was in the Bail Court.

Order of Sessions quashed.

The KING v. The COUNTY CLERK of MIDDLESEX.

ON a former day a rule was obtained, calling on the County Clerk of *Middlesex* to shew cause why an information should not be filed against him for alleged misconduct in his office. It was alleged, among other matters, that he had exacted greater fees, in a cause in which *Joseph Brock* was the plaintiff, and *James Hulme* was the defendant, than are authorized by the statute 23 Geo. 2. c. 33. the defendant in that case having been charged 8s. 10d. for his costs of suit, contrary to the said act. Cause was now shewn against the rule upon affidavits of considerable length, in which the alleged misconduct of the County Clerk was completely negatived; and as to that part of the case which imputed the exaction of illegal fees, the practice of the County Court, from the year 1772 down to the present time, was stated to be this:—The plaintiff being entered, a warrant is issued, upon which the defendant is summoned to appear on a given day. If the plaintiff and defendant both appear on being called on the day appointed, the defendant's appearance is entered, the cause is heard, and an order made and entered according to the verdict; and the whole cost of a suit thus terminated amounts to 3s. 6d., including county clerk's, bailiff's, and crier's fees. But if the defendant does not appear on being called, the plaintiff is heard as to the amount

The County Clerk of *Middlesex* is entitled to take the following fees upon the hearing and determination of suits in his Court, viz. upon the appearance of both parties upon the first summons and determination of the cause, 3s. 6d.: upon an order nisi in consequence of the non-appearance of the defendant upon the first summons, 2s.; and upon execution on a judgment against the defendant, 3s. 4d.; which sums include the fees to the county clerk, bailiffs, and criers.

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claimed, and an order nisi is made and entered for judgment on a future day. This order nisi is served on the defendant, and if he appears on the second day appointed, the case is heard as before, and an order absolute is made according to the verdict. The whole cost of the suit in the last-mentioned case amounts to 5s. 6d.; and if the defendant does not appear on the second day, an order absolute is made, and entered for judgment by default; and the whole cost in that case is 5s. 4d.: such costs in each of the two last-mentioned cases including the fees of the county clerk, bailiffs, and criers. But the cost occasioned by the defendant not appearing on the summons, amounting to 2s. or 2s. 2d. according to criers, is always paid and borne by the defendant, as being his default; and if the debt and costs are not paid on the day or days specified in the said orders absolute, the plaintiff has a right, at any time within a year, to demand an execution against the defendant, the cost of which is 3s. 4d., that is to say, 4d. to the county clerk, for the execution, and 3s. to the bailiff executing the same. In the present case the defendant had been summoned for a debt under 40s., but not appearing on the day appointed, an order nisi was made upon him to attend the Court on a second day, when he attended accordingly, and the cause being heard, a verdict was found by the jury against him, and execution awarded for the debt and costs, the amount of the latter being 8s. 10d. which sum was composed of the following items, 3s. 6d. for the order, 2s. for the order nisi, and 3s. 4d. for the execution, according to the practice of the court as above set forth. The county clerk stated in his affidavit that previously to his appointment to the said office, one *Peter Hardy*, together with certain other freeholders of the county of *Middlesex*, presented a petition to the Lord High Chancellor in pur-

nce of the power given by section 16 of 23 *Geo. 3.*
 3. complaining of the then practice of the Court, and
 other or greater fees were exacted by the then county
 k than the said act allowed; that the said petitioners
 n proceeded in their said petition to state the practice
 the court, as it now exists, and as is above set forth,
 the fees taken for each particular proceeding in the
 urt, which fees so set forth and complained of, were
 every respect the same fees as are now taken by the
 sent county clerk; that the matter of the said petition
 l been fully heard before Lord *Ellenborough*, C. J.
 l *Gibbs*, C. J. and after hearing all parties, they
 udged as follows:—"We have considered the within
 ition, together with the affidavit of the within-men-
 ned *Peter Hardy* and *Thomas Leach*, and the papers
 reto annexed, and have been attended by the respective
 omies of the said *P. H.* and of the said *T. L.* and we are
 opinion that the fees which are stated to have been re-
 ved by the said *Thomas Leach* and the other officers
 the said County Court for *Middlesex*, held under the
Geo. 2. c. 33. are justified by a fair construction of
 t act; and we are also of opinion, that upon the facts
 omitted to us, and upon our view of the said act of
 liament, there is no ground for criminating the said
omas Leach in respect of any thing which appears to
 e been done by him in the execution of his office of
 unty Clerk; but we think that the warrant, in obe-
 nce to which the summons in each case is stated to
 e, and which we consider to be analogous to the
 rriff's precept to his bailiff for the summons in the old
 unty Court, ought, in point of fact, to have issued,
 should issue hereafter in each case as an authority to
 bailiff for the summons."

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The COURT, after hearing the facts and circumstances

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disclosed on affidavit on both sides, were clearly of opinion that there was no pretence for granting an information on the ground of misconduct on the part of the County Clerk in his office; and with respect to the alleged exaction of excessive fees, they observed that the determination of Lord *Ellenborough*, C. J. and *Gibbs*, C. J. as to the practice of taking fees, was conclusive upon the subject, and afforded a complete answer to the complaints now alleged, inasmuch as the fees demanded were in this instance similar in amount to those which had received the sanction of those learned Judges.

The Rule was therefore discharged with costs.

*French* was for the prosecution, and *Scarlett* and *Brodrick* for the defendant.

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MORGAN v. PALMER.

Where the mayor of an ancient borough, in which he was also a justice of the peace, took a fee of 4s. from a publican resident within the borough, for renewing his annual license, and though it appeared that for fifty-seven years a similar fee had been uniformly received by the mayor for the time being, from every publican within the borough applying to have his license: Held, that such fee was illegal, and might be recovered back in assumpsit for money had and received, without notice of action.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiff. Plea non assumpsit, and issue thereon. At the trial, before *Garro*, B. at the *Norfolk Lent* Assizes, 1823, the plaintiff had a verdict, subject to the opinion of the Court, upon the following case:


The plaintiff is a publican, in the borough of *Great Yarmouth*, where he resided and carried on business in the year 1822, during which year the defendant was mayor of the borough. In the month of *September*, 1822, a meeting was duly held by the defendant, who, in his

character of mayor, was then one of the justices of the peace in and for the borough, and by another justice of the peace in and for the borough, for the purpose of renewing the annual licenses of the publicans in the borough. The plaintiff attended at that meeting, in order to renew his license, and the clerk to the said justices, who is also town clerk and clerk of the peace for the borough, on granting to the plaintiff his license, demanded a sum of 12s. 6d. which the plaintiff accordingly paid. The clerk then paid over to the defendant a sum of 4s., part of the said sum of 12s. 6d., which he had received on the account and by the authority of the defendant as mayor. He also paid over the sum of 2s., other part of the said sum of 12s. 6d., to the serjeants at mace, and retained the sums of 4s. 6d. as clerk to the justices, and 2s. as clerk of the peace, the residue thereof, to his own use. *Great Yarmouth* is an ancient and immemorial borough. Until the reign of Queen *Anne*, the chief officers of the corporation were two bailiffs. Various charters, from the reign of King *John* to that of Queen *Ann*, granted to the bailiffs all ancient and usual perquisites, fines, emoluments and profits, which they had before by pretext of any incorporation, or by reason or pretence of any prescription, use, or custom, held, enjoyed, or used. By an act 1 *Ann*, st. 2. c. 7. it was enacted, that when the style of the corporation should be changed from that of bailiffs, aldermen, burgesses, and commonalty, to that of mayor, aldermen, burgesses and commonalty, the mayor and his successors should have and enjoy all the same fees, perquisites, privileges and jurisdictions, as the bailiffs had before lawfully claimed and demanded. By a charter in the following year, the style of the corporation was changed, and it was thereby provided, that the first mayor therein named, and his successors, should have and enjoy the same powers, privileges, fees, perqui-

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sites and profits, as the bailiffs in any manner had before held and enjoyed, within the liberties and precincts of the said borough. No entries were made of the sums paid for licenses in the books of the corporation, but as far back as living memory went, that is to say, from the year 1765, up to the time of bringing this action, the same sum of 4s. had been uniformly received by the mayor for the time being, from every publican applying for a license, as his usual and accustomed fee for granting it. No notice of the action was given previously to its commencement.

*Rolfe*, for the plaintiff. There are three questions in this case. First, Whether the defendant was entitled, under the 24 G. 2. c. 44. s. 1. as a justice of peace, to a month's notice of action, previous to the suing out of the writ. Second, Whether the defendant was justified, either by any statute-law, or prescription, in demanding and receiving from the plaintiff the sum of 4s. previous to granting him a license. And third, Whether the plaintiff, having paid that money, can recover it back, in an action for money had and received. For the plaintiff, it is submitted, that the Court must answer the first two of these questions in the negative, and the third in the affirmative; the second, however, seems to be the most important, and may with most advantage be argued first in order. The first statute which regulated the sale of beer in alehouses, by means of licensing the proprietors, was the 5 & 6 E. 6. c. 25. which recites that "intolerable hurts and troubles to the commonwealth of this realm doth daily grow and increase, through such abuses and disorders as are had and used in common alehouses, and other houses called tippling-houses," and enacts that no person shall in future sell ale or beer without a license, to be granted by the Sessions, or by two justices

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of the peace ; and that every person so licensed, shall be bound by recognizance for the proper conduct of their house, “ for making of every which recognizance, the party so bound shall pay but twelve-pence.” There are many subsequent acts of parliament upon the same subject, but the only one which it is material to notice, is the 3 G. 4. c. 77. s. 5. which provides that for filling up the license, and for taking and returning the recognizance to be entered into, the sum of five shillings, and no more, shall be taken by the justice’s clerk, over and above the fees to be paid to the several clerks of the peace for filing the recognizances. If, therefore, the defendant was entitled to exact from the plaintiff the sum of 4s. upon granting him a license, it is clear that he cannot derive his title from the statute book, and it remains to be seen, whether by the prescription of this borough, and the custom which is said to have obtained there previously to the 1 Ann. st. 2. c. 7. he is in a better situation. By that act the mayor is empowered to have the same fees as the bailiffs had before lawfully claimed and demanded. Now the fee which had before been lawfully claimed and demanded for granting a license, must have been “ but twelve-pence ;” and that, therefore, was the only fee which the defendant was entitled to have, unless he can shew an immemorial usage in the borough for taking a fee of 4s., which certainly he cannot. It will, perhaps, be said, that this fee was taken, not in respect of the license, but on some other ground. Unless, however, some other justifiable cause for the exaction is plainly shewn to the Court, they will not presume it : none such is suggested in the case, and it is difficult to imagine that any such *can* really have existed. Then shortly, with respect to the first point. It has been decided by *Umphelby v. M<sup>c</sup>Lean* (a), that in an action for money had and received,

(a) 1 B. &amp; A. 42.

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brought against collectors for excessive charges on a distress for arrears of taxes, the defendants were not entitled to a month's notice under the 43 G. 3. c. 92. s. 70; which is in effect deciding the present case, because the two statutes have the same object, are founded upon the same principle, and are couched nearly in the same terms. Besides which, it is quite evident from the tenor of the 24 G. 2. c. 44. s. 1. that it was not designed to apply to an action in this form, brought to recover money paid under circumstances like the present. Thirdly, the plaintiff may recover this money in the present form of action. The argument *contra* will be, that he has paid the money in his own wrong, and therefore that the action cannot be maintained. That rule must be admitted to prevail in some instances, but it does not apply here; because the plaintiff paid the money under a species of duress, and therefore it was not a payment in his own wrong. If he had not paid the money he could not have obtained the license, without which, either he could not have carried on his trade, and must have been reduced to ruin, or he must have continued to carry it on against the law, and under the peril of heavy penalties for so doing. It was therefore "a payment by compulsion," within the rule laid down by the court in *Astley v. Reynolds* (a), and may be recovered in an action of assumpsit. [Abbott, C. J. There the money was paid under a protest.] So it virtually was here; but that is immaterial, for in *Dew v. Parsons* (b), it was held, that an attorney might maintain money had and received against a sheriff for the excess paid above the legal fee for issuing a warrant, and there the money had been paid without any objection or protest whatever. In addition, one great and general argument is important to the decision of this case, namely, that it is against public policy, and a violation of public

(a) 2 Str. 915.

(b) 2 B. &amp; A. 562.

justice, that a person in the situation of the defendant should receive any fee for performing his duty; it was corruption and extortion in him to take it, and it was an infringement of the rights of the plaintiff, that he should be compelled either to pay it, or to lose the license to which he was entitled, and which was essential to the carrying on his business, and to his support in life. On all these grounds, therefore, it is clear that the plaintiff is entitled to the judgment of the Court.

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*Dover*, contra. If the defendant received the money in his character of a justice of peace, it is quite clear that he was entitled to notice of action; and if it is doubtful in what character he received it, still his right to notice is unimpaired, because, as the words of the statute are general, it will be presumed that he acted as a justice. *Biggs v. Evelyn* (a). The case of *Umpfelby v. M'Lean* (b), is very distinguishable from the present; it was decided upon a different statute, and has no bearing upon that now under consideration. But *Greenway v. Hurd* (c) is directly in point; for there the objection was founded upon the 23 G. 3. c. 70. s. 30. which is worded precisely the same as the 24 G. 2. c. 44. s. 1. and it was there held that an excise officer, who had received duties not legally payable, was entitled to notice of action. [*Bayley, J.* But there he received the money bonâ fide, believing that it was legally due, and he proved the honesty of his intention by paying the money over to his superior. That was the ground of the decision there.] The general principle laid down in that case was, that wherever the officer acts colore officii he is entitled to notice, and certainly the present defendant must be considered as acting

(a) 2 H. Bl. 114.

(b) 1 B. &amp; A. 42.

(c) 4 T. R. 553. See *Prestidge v. Woodman*, ante, vol. i. 502. *Bird v. Constable*, (n) *Id.* 504.

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colore officii. [*Holroyd*, J. I think not. The claim set up by the defendant was not made in execution of his office as a justice; in *Greenway v. Hurd* it was; that makes a vital distinction between the two cases.] That distinction undoubtedly was taken in *Irving v. Wilson* (a), which at the first glance appears to be an authority against the present defendant; but there it was plain that the goods seized were not liable to seizure, and that the officer knew that fact, because he received the money to release them; therefore the payment was made under duress, and was received not colore officii, and it was on these grounds that the Court held that notice of action was unnecessary. The decisive argument on behalf of the defendant, however, is, that this fee of 4s. is a just and legal fee, which he was fully entitled to take; first, by prescription; secondly, by the act of parliament and charter of 1 *Ann*; and thirdly, because there was a good and reasonable consideration for it. With reference to the question of prescription, the Court must, on this occasion, act in the double capacity of jurors and judges, for there was no evidence upon the subject produced at the trial. The case, however, finds that this fee has been regularly and constantly paid in the borough, throughout a period of nearly 60 years, and therefore in the absence of proof to the contrary, the Court will presume that a custom which has prevailed so long, is an immemorial custom. *Rex v. Jolliffe* (b). [*Bayley*, J. The fee was taken for granting a license; now the power of granting licenses, we know, is not immemorial: how then can we presume that a custom to take fees for granting them is immemorial?] The present argument must go the length of saying, that the power of granting licenses, or something equivalent to it, is immemorial. The preamble of the 5 & 6 E. 6. c. 25. shews, that the necessity for


(a) 4 T. R. 485.

(b) 3 D. & R.'s. T. R. 240.

regulating the management of alehouses was at that time no new thing, and earlier enactments upon the same subject are to be found in the 12 *E.* 4. c. 8. the 13 *R.* 2. c. 38. the 9 *E.* 3. c. 25. and in *Magna Charta* (9 *H.* 3. c. 25). [*Abbott*, C. J. Admitting all these, still the power of licensing is not carried up to the necessary period; it is not shewn to be immemorial; indeed it plainly appears not to be so; how can we hold that a custom to take fees for granting licenses is immemorial, when the power of granting them, and indeed the very subject of grant appears to have arisen within the time of legal memory? This point really seems to me too plain for argument.] Then, secondly, the 5 & 6 *E.* 6. c. 25. and all subsequent statutes upon the subject, authorise the taking of fees on granting beer licenses. [*Bayley*, J. Some fees to some individuals; but is there any one statute which authorises the taking of this fee by a person in the situation of this defendant?] The 1 *Ann* certainly seems to authorise it. But, at any rate, it is, thirdly, justifiable to take this fee, because the granting the license was a good and reasonable consideration for it. This is like the case of pickage and stallage in a market. It is not an uncommon thing in many parts of *England*, to pay a fee for selling goods in particular places; and if it is a reasonable fee, the Court will uphold it. What is a reasonable or unreasonable fee is for the judgment of the Court. 2 *Inst.* 210. [*Bayley*, J. Ought a Justice of the Peace to receive money for the performance of his duty? The proposition is too monstrous to be advanced for a moment. Then ought the defendant to take a fee for performing his duty as the mayor of a borough?] The argument is that the defendant was acting as a Justice in granting the license, but that he received the fee as the mayor of the borough, as he might legally do. [*Bayley*, J. What he does as a

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mayor he does as a justice.] As to the third point, it is clear that the plaintiff cannot recover in this form of action. He paid the money voluntarily with a full knowledge of the law; though even if he were ignorant of the law, that would not entitle him to maintain assumpsit. He knew that the same fee was paid by others under similar circumstances; he had himself paid it before, and he paid it on this occasion without remonstrance or objection. [*Holroyd, J.* Was not the mere act of demanding a fee illegal in a public officer? If so, the plaintiff may maintain his action.] He paid the money voluntarily, with full knowledge, or full means of knowledge, of all the facts of the case, then he cannot recover it back again on account of his ignorance of the law. *Bilbie v. Lumley (a)*, *Brisbane v. Dacres (b)*, *Bize v. Dickason (c)*, *Knibbs v. Hall (d)*, and *Stevens v. Lynch (e)*. [*Bayley, J.* Is not *Snowdon v. Davis (f)* a case which comes nearer to the present than those, and does it not militate against the doctrine now contended for? Surely, where the money is paid under the influence of duress, or oppression, or fraud, it is recoverable. *Abbott, C. J.* "Ignorance of the law" means of the general law of the land; but a man is not bound to know the local or bye laws of a particular town or borough.] At all events the plaintiff has sustained no hardship, because, as he had paid the fee before, and knew that others had paid it also, no duress, or oppression, or fraud, was practised upon him; he acted voluntarily, with full knowledge both of the law and the facts; and he cannot now come into Court and repudiate his own act by bringing an action.

*Rolfe*, in reply, was stopped by the Court.

(a) 2 East, 469.  
 (b) 5 Taunt. 143.  
 (c) 1 T. R. 285.

(d) 1 Esp. 84.  
 (e) 12 East, 38.  
 (f) 1 Taunt. 359.

ABBOTT, C. J.—I am of opinion that the plaintiff is entitled to recover. The first, and, as it seems to me, the main question in this case is, whether the defendant had any legal authority to demand the payment of this fee. It is said that it was legally due to him in his character and office of mayor; but it was received for the granting of a license, which it is admitted he did in his character and office of justice. The case finds that a similar fee has been received on similar occasions for a long term of years; but we cannot therefore presume that there is an immemorial custom for receiving it, especially when we find that the license, in respect of which it is claimed, is not itself immemorial. By the common law, we know that no license was necessary; if there were an immemorial custom in this borough that no person should sell beer without a license, the common law would be restrained, and a license would become necessary there; and then a co-existing custom that the licensed person should pay a fee of 4s. would become a good and binding custom, so far as its antiquity went; but whether such a custom would be good in law, it is not at present requisite to decide. But neither of these are proved; there is no proof of any fee being taken earlier than the reign of *Edward* 6. and therefore we certainly cannot presume that it ever was taken before that time; because where a law or custom is to have the effect of narrowing the public right, it is an established rule to require strict and clear evidence of its existence and extent. Then with respect to the notice: if it is admitted that the defendant exacted the fee in his character of mayor, the 24 G. 2. c. 44. does not apply; if it is doubtful in which character he was acting, then, according to the case of *Biggs v. Evelyn* (a), he was entitled to notice: but if it is plain that he was acting in his character of justice, then I am of opinion that he was

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(a) 2 H. Bl. 114.



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not entitled to notice in this particular case. The object of the act of parliament was to protect magistrates from the consequences of mistakes or errors of judgment, but not of illegal acts done for their own emolument. Now, I think, the defendant's conduct comes under the latter description; he was not acting in execution of his office, nor under any error or mistake, and therefore I think he was not entitled to notice. Then as to the form of action: it is said this was a voluntary payment made with full knowledge of the law and the facts; and if it were so, I admit that the money could not be recovered in this action. But in order to render a payment voluntary, in the proper sense of the word, the parties concerned must stand upon equal terms; there must be no duress operating upon the one; there must be no oppression or fraud practised by the other. But what is the case here? The parties stand upon the most unequal terms imaginable; there is a duress operating upon the publican, for unless he pays the money he cannot obtain his license; there is oppression practised by the justice, because he exacts a fee to which the law does not entitle him, and exacts it upon an implied threat of withholding the license. This cannot be called a voluntary payment, and in that respect this differs from all the cases that have been cited on the part of the defendant, with reference to this point. Upon all the questions raised by this case, I therefore am of opinion that this action is maintainable, and that the plaintiff is entitled to judgment.

BAYLEY, J.—The defendant took the fee either as mayor or as justice. As justice, it is admitted that the law did not allow him to take it; then is there any law or custom which authorises him to take it as mayor? No such authority has been produced to us to-day; and, reasoning upon general principles, we must say that none

uch can possibly exist. As the chief magistrate of a borough, he has certain public duties to perform, one of which is to grant licenses to such publicans resident within it as are qualified to receive them, and it would be subversive of all decency, as well as of all policy and law, if for the performance of that duty he could be allowed to accept a compensation in money. But is he able, in an action for money had and received, to refund his money? If it was paid voluntarily, in the strict and proper meaning of the term, certainly not; except, indeed, where the payment is of a nature to infringe public policy. I think this was of such a nature; for if the defendant can retain such fees as he may chuse to exact, an undue and injurious bias will soon operate upon his mind, and the criterion upon which he will act in granting a license will be, not who is the most deserving of it, but who is able and willing to pay the largest price for it. But neither was this a voluntary payment; the plaintiff stood in a situation of great disadvantage; the defendant had an undue power and influence over him: they were not on equal terms, for the plaintiff was compelled to pay the money. Upon that ground, therefore, the action is maintainable. Lastly, was the defendant entitled to notice of action? As mayor he certainly was not, and as justice I also think he was not, because he did not receive the money *colore officii*, but acted so as to bring himself within the principle laid down in *Irving v. Wilson*(a). It seems to me, therefore, upon every point, that our judgment ought to be given for the plaintiff.

HOLROYD, J.—By the common law licenses were not necessary, and no immemorial usage has been shewn for making them necessary, in this borough; we cannot, therefore, presume its existence. The statute of *Edward*

(a) 4 T. R. 485.

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certainly does not authorise a fee of 4s., and no custom has been proved to warrant the taking that or any other fee. The license in this case was granted by the defendant, not singly, but with another justice; which makes it evident that he was not then acting as mayor, but that they were both acting as justices. If the act of receiving the fee had been done in the execution of his office, the defendant would have been entitled to notice of the action, even though he acted erroneously in receiving it; for that position *Greenway v. Hurd* (a) is an authority; but it was done with a very different view; it was done for his own benefit and profit, and therefore this case comes within the principle of *Irving v. Wilson*. As respected the plaintiff, the payment cannot be considered as voluntary, and therefore, in that point of view, it is equally recoverable. I concur that our judgment must be given for the plaintiff.

LITTLEDALE, J.—I am decidedly of opinion that the defendant has no legal authority to retain this money. He had no right to receive it, either in the character of mayor or justice. No prescription has been made out, either for the necessity of the license, or for the exaction of the fee. In *Rex v. Jolliffe* the antiquity of the custom might fairly be presumed, because there the subject matter of it, a court-leet, was in itself immemorial; but here the custom cannot be presumed, it must be proved. The statute of *Edward 6.* not only does ~~not~~ authorise this fee to be taken, but it does authorise a different fee, namely, “but twelve-pence.” The 24 *Geo. 2.*, requiring notice of action to justices, does not embrace this case. The action for money had and received is generally exempt from that and other similar statutes; but even if it were not, it certainly would be in this instance,

(a) 4 T. R. 553.

because here the receipt of the money was an act done by the defendant extra his office, and for his own private emolument; besides that it was exacted by a very improper species of duress and compulsion. It is said that the plaintiff had paid the same fee on former occasions; but that does not vary the case; it was a payment by compulsion in this instance, and had probably been the same in all. I perfectly agree in thinking that the action is maintainable, and that the postea ought to be delivered to the plaintiff.

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Postea to the plaintiff.


The KING v. The INHABITANTS of IDDESLEIGH.

BY an order of two Justices *Samuel Rattenbury*, *Ann* his wife, and *Mary* their daughter, were removed from the parish of *Iddesleigh* to the parish of *Dowland*, both in the county of *Devon*. On appeal, the Sessions quashed the order, subject to the opinion of this Court, on the following case:

The pauper was bound an apprentice in 1806, by parish indentures, to *John Arnold*, in the respondent parish; which indentures expired on the 24th *June*, 1813. He resided in the same parish, working with his master, from the commencement of his apprenticeship to another master at weekly wages, to which service the first master gave his consent; and at the end of that month, the pauper entered into a fresh agreement with the second master at the like wages, and continued to serve under that agreement until the 7th *June*, when he was called out to serve in the Local Militia, which he did for a fortnight and returned to his second master on the 21st *June* and made a new agreement to serve him as before at sixpence a day, and while in that service he slept from the 21st to the 24th of *June* inclusive in the parish of *L*: Held, that whether the service with the second master during the remainder of the term was with the consent of the first or not, still the pauper's sleeping for the last three nights in *I*. settled him in that parish though the first master did not know of his sleeping there.

Where an apprentice served his master for six years and nine months in the parish of *I*. under indentures which expired at *Midsummer-day* and then went into the parish of *D*. and hired himself for a month

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until *Lady* day, 1813, when he left him, and entered into an agreement with *Thomas Weeks*, in the appellant parish, to serve him for a month, at 2s. 6d. per week. After this agreement was made, and before the pauper went into *Weeks's* service, *Arnold* saw *Weeks* and consented to the pauper's service with him; and the pauper then went for the first time to reside in the appellant parish. At the expiration of the first month the pauper and *Weeks* came to another agreement for a second month at 3s. 6d. a week, and the pauper continued to work with *Weeks* at the same rate of wages, and to reside in the appellant parish until the 7th *June*, when he left *Weeks* in consequence of being called out to serve in the Local Militia in a third parish. Having served a fortnight in the militia, he returned on the 21st *June* to *Weeks* and made a new agreement to serve him in the same capacity as before at 6d. a day, and while in *Weeks's* service from the 21st *June* including that day, the pauper slept continually for two or three months at his mother's in the respondent parish. The question for the opinion of the Court is whether the pauper was settled in the parish of *Dowland*.

Crowder in support of the order of Sessions was stopped, the Court intimating that even if there was a consent on the part of the first master to the pauper's service with the second after he left the militia, his sleeping the last three nights in the parish of *Iddesleigh*, though without the knowledge of *Arnold*, would be a service under the indenture in that parish and so confer a settlement there.


Marryatt and *Fraser*, contra. This case falls within the decision in *Rex v. Smarden (a)*. There, the appren-

(a) 13 East, 452.


tice, after serving most of his time with his master in *S.*, obtained a subsequent settlement in *H.*, by serving another master there for forty days, by the direction of his first master, who was to receive 3s. per week from the second master for such service; and being then dismissed by the second master, the apprentice, unknown to the first master, and without any intention of returning into his service again, lodged for one night in *S.*, and then went into a third parish, and worked for himself a month, when, his term having expired, he returned to *S.*, and went with his first master to a common friend, with whom the indenture had been deposited, to take it up; which he did, and carried it away. It was held that the settlement was not brought back to *S.* by such *casual* lodging of the apprentice one night in the parish of his master without any resumption of, or even intention to resume the service with his first master under the indenture.

[*Abbott, C. J.* That case is distinguishable from the present in two particulars; first, the second service was entered upon with the consent of the first master; and second, the fact of the apprentice sleeping one night in the parish of the first master, was unknown to him, and was a casual act, not done with the intention of resuming the service under the indenture.] There is a general consent of the first master here to the pauper's entering into the second service, and that is sufficient. [*Abbott, C. J.* Still the pauper sleeping the last three nights of his term in the parish of *Iddesleigh* removes the settlement to that parish, because he was then serving under the indenture.]

ABBOTT, C. J.—I think the Sessions have determined this case rightly. The pauper had made an agreement to serve *Weeks* in the parish of *Dowlund*, for a month at 2s. 6d. per week. The latter communicated this cir-

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cumstance to the former master, who consents to the service, and for that purpose the pauper goes into, and resides in the appellant parish, under that contract. At the expiration of that month the pauper was at liberty to quit, and *Weeks* was at liberty to part with him. Then they came to another agreement for another month at 3s. 6d. per week, and the pauper remains in the appellant parish until he goes into the militia. At the end of a fortnight he returns to *Weeks* and enters into a third agreement at 6d. a day; but it does not appear that the agreement was for any specific length of time. The Sessions seem to have been of opinion, that there was either a consent of the former master specially or generally for the pauper to serve *Weeks*. If it was a special consent, then it must be a consent to the terms of service for which the parties had agreed previously to the return of the pauper to *Weeks's* service; and if it be so considered, then there would be only one service, with the assent of the original master. But on the other hand if it was a general assent that the pauper should serve *Weeks* during the remainder of the term, then, though the service during the last three days was in the parish of *Dowland*, still that would not confer a settlement, for during the nights of those three days he slept in *Iddesleigh*, and therefore whatever view is taken of the case, whether we consider it as a special or general assent, it seems to me that no settlement was gained in *Dowland*.

BAYLEY, J.—I think the Sessions did right in forming the conclusion to which they came. It was for them to decide whether the first consent was general or definite. On whatever ground they decided, their decision is correct, the pauper having slept during the last three nights in the parish of *Iddesleigh*. It is said that the sleeping must be connected with the service.

To that I accede ; but it must be a sleeping in the parish in which the service is. It has been decided over and over again in the case of a hired servant, that sleeping the last night in the parish in which the pauper is hired, will determine the settlement though there is no work done in that parish (a). Though the pauper in this case slept the last three nights in *Iddesleigh* without the first master's knowledge that will make no difference.

HOLROYD, and LITTLEDALE, Js.—~~concurred~~.

Rule discharged.

(a) 4 Burn, 402. 3. 4. & 10. See 8 T. R. 108. 4 Burn, 436. Id. 422. 430. 412. 417.

In the matter of *Rix* and Another.

SCARLETT on a former day obtained a rule calling upon two Justices of the county of *Surrey* to shew cause why a mandamus should not issue to them, commanding them to insert in the record of a conviction under the Building Act, 14 *Geo.* 3. c. 78. the evidence given on the hearing of the information upon which the conviction was founded, as nearly as possible in the words used by each of the witnesses examined upon the said hearing, in pursuance of the 3 *Geo.* 4. c. 23., it being suggested that they had omitted many parts of the evidence material to the defendant's case.

Where justices omitted to set out on the record of a conviction on the Building Act, the evidence adduced on the hearing of the information, as nearly as possible in the words used by each of the witnesses, in pursuance of 3 *G.* 4. c. 23. a mandamus issued to compel them to do so.

Cowley (with whom was *Thesiger*) now shewed cause, and contended that it never could have been the intention of the legislature in passing the statute 3 *Geo.* 4. c. 23. to impose upon Justices the necessity of setting out upon the record of conviction the evidence of all the witnesses, whether relevant or irrelevant to the matter at issue,

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which a defendant, or even an informer, might think proper to adduce on the hearing of an information. That act gave a form of conviction to be adopted in all cases where no particular form was given by the statute; but although it directed that the evidence, as nearly as possible, in the words used by the witnesses, should be stated on the record; yet there was considerable doubt whether that direction extended to the evidence given on the behalf of the defendant. The words within the brackets were [*“ here state the evidence, and as nearly as possible, in the words used by the witness; and if more than one witness be examined, state the evidence given by each,”*] [*or, if the defendant confess, instead of stating the evidence, say*] and the said *E. F.* acknowledged and voluntarily confessed the same to be true, &c.” Now here there was no express direction that the evidence for the defendant should be set out in case he did not confess. All that the direction imported was, that where the defendant did not confess, then the evidence in support of the information should be set out; but where he confessed, then it need not be set out, and the Justice is simply to state the nature of the charge contained in the information, and then proceed to state that the party acknowledged and voluntarily confessed the same to be true. If the present application could succeed, it would entirely defeat the object of the statute, which was to facilitate summary proceedings before Justices, and to remedy the inconveniences often arising from the want of a general form of conviction. If the Justices were required to set out all the evidence in this case, they must load the record with a great deal of irrelevant and impertinent matter, and this would impose upon them a degree of difficulty which never could have been in the contemplation of the legislature, and which is certainly not authorised by the terms of the statute.

Scarlett, Barnewall, and Chitty, contra, insisted that the direction of the statute was clearly intended to embrace the evidence both pro and con. The object of the Legislature was to require the Justices to shew upon the face of the record that the conclusion of guilt, which they had drawn by the conviction, was warranted by the evidence. This object could not be effected by partially setting out the evidence on both sides on the hearing of the information. There was no desire in the present case to load the record with irrelevant matter; all that was required was, that the Justices should set out so much of the evidence on both sides as would raise an important question on the Building Act, which the parties interested wished to bring under the consideration of the Quarter-Sessions. To this extent the application was justified by the terms of the statute.

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ABBOTT, C. J.—I am clearly of opinion that the direction in the statute embraces the evidence both in support of the information and for the defence. The Justices are not bound to set out all the irrelevant matter which may happen to be given in evidence before them. They are to state the evidence as nearly as possible in the words used by the witnesses; but this must be understood to mean such evidence as is relevant to the charge contained in the information. The Justices must use their discretion in this matter; but it is quite clear that it is their duty to attend to the general direction contained in the statute. Here the Justices have not done that which the act requires them to do; and the single question is, whether we are to order them to do that which the law requires them to do; and I am of opinion that this rule must be made absolute. There was a similar application to this, made last *Easter Term*, in the case of a game conviction (a); and we were of opinion

(a) *Rex v. Marsh*, ante, 182.

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on that occasion that it was the duty of the Magistrates to set out the evidence on both sides where it was relevant to the matter at issue.

The other Judges concurred.

Rule absolute (a).

(a) It may be useful here to insert the form given by the statute 3 G. 4. c. 23. which is as follows:—

County [or } Be it remembered, that on the day of
as the case } in the year of our Lord at in the
may be] of } county of A. B. of in the county of
Labourer, [or as the case may be] personally came before me
[or, before us, &c.] C. D. one [or more, as the case may be] of His
Majesty's Justices of the Peace for the said and informed
me [or us, &c.] that E. F. of in the county of on the
day of at in the said did [here set forth the
fact for which the information is laid] contrary to the form of the sta-
tute in such case made and provided, whereupon the said E. F. after
being duly summoned to answer the said charge, appeared before
me [or us, &c.] on the day of at in the said
and having heard the charge contained in the said information, de-
clared he was not guilty of the said offence [or, as the case may hap-
pen to be] did not appear before me, [or us, &c.] pursuant to the said
summons, [or, did neglect and refuse to make any defence against
the said charge]; whereupon I [or we, &c. or nevertheless I, or we,
&c.] the said Justice, or Justices, did proceed to examine into the
truth of the charge contained in the said information, and on the
day of aforesaid, at the parish of aforesaid, one
credible witness, to wit, A. W. of in the county of
upon his oath, deposeth and saith [if E. F. be present, say, in the
presence of the said E. F.] that within months [or, as the
case may be] next before the said information was made before me
[or us, &c.] the said Justice by the said A. B. to wit, on the
day of in the year the said E. F. at in the said
county of [here state the evidence, and as nearly as possible
in the words used by the witness; and if more than one witness be
examined, state the evidence given by each] [or, if the defendant con-
fess, instead of stating the evidence, say] and the said E. F. acknow-
ledged and voluntarily confessed the same to be true; therefore, it
manifestly appearing to me [or us, &c.] that he the said E. F. is
guilty of the offence charged upon him in the said information, I [or
we, &c.] do hereby convict him of the offence aforesaid, and do de-
clare and adjudge that he the said E. F. hath forfeited the sum of
of lawful money of Great Britain, for the offence afore-
said, to be distributed [or paid, as the case may be] according to the
form of the statute in that case made and provided. Given under
my hand [or our hands, &c.] and seal, the day of in the
year of our Lord

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LEICESTER.

BY an order of two Justices, *Caroline Littlewood* was removed from the parish of *All Saints*, in *Derby*, to the parish of *St. Nicholas* in *Leicester*. On appeal, the Sessions confirmed the order, subject to the opinion of this Court on the following case :—

A bastard child, born in an extra-parochial place, does not acquire its mother's settlement.

The pauper is the illegitimate child of *Elizabeth Littlewood*, now deceased, and was born in the month of *May*, 1822, in an extra-parochial place, called the *Black Friars*, in *Leicester*, which is not a vill, and for which no overseers have ever been appointed. She was shortly afterwards taken by her mother to the parish of *All Saints*, *Derby*, where she remained until the death of her mother, and up to the time of making the order of removal in question. *Elizabeth Littlewood*, the mother, had, six years previously to the birth of the daughter, gained a settlement in the parish of *St. Nicholas*, and was legally settled in that parish at the time of the birth of the child, and of her own death.

N. R. Clarke (with whom was *Goulburn*), in support of the Sessions. The question for the decision of the Court is, whether a bastard, born in an extra-parochial place, where it can acquire no settlement by birth, is removeable to the place of settlement of the mother. That question must be decided in the affirmative. The child of a *British* born subject must ex necessitate have a settlement somewhere. If it be an illegitimate child, and cannot acquire a birth settlement, its settlement must follow that of the mother, to which it is removeable. This principle is not new. So early as 2 *Bulstrode*, 358. it was resolved that if a child be born a bastard in the

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House of Correction, to which the mother has been sent, its settlement shall follow that of the mother, and it shall not be settled in the parish where the prison is situate. When that case was decided, there was no act of parliament respecting the settlement of bastard children; but since then various statutes have passed providing for the case of a birth pending an order of removal (*a*); for bastards born in lying-in hospitals (*b*); in a house of industry in an incorporated district (*c*); under a certificate from a benefit society (*d*); in gaol (*e*); and where a pregnant woman has been fraudulently removed from one parish to another (*f*). In the case of *Whitechapel v. Stepney* (*g*) it is laid down that the place of the birth of a bastard child is the place of its settlement; "for it gains a settlement in such place ex necessitate." But if the birth place be extra-parochial, and consequently it can have no settlement in such place, it follows of necessity that it acquires a settlement by parentage, for otherwise it cannot be provided for at all, but must perish. [*Bayley, J.* Every person is entitled to be provided for in the parish where he happens to be, unless the parish officers can find some other place to which he may be sent.] But suppose the case of an illegitimate child residing in an extra-parochial place, there is no mode by which such a child can obtain relief but by committing an act of vagrancy and wandering into some parish in order to obtain that support which the law considers him entitled to receive. A bastard child, born in the transit of the mother from one parish to the other, is held to be settled in the mother's parish (*h*). [*Bayley, J.* Certainly. Suppose the mother to be resident in the

(*a*) 35 G. 3. c. 101. s. 6.

(*b*) 13 G. 3. c. 82. & 54 G. 3. c. 170.

(*c*) 20 G. 3. c. 36. & 54 G. 3. c. 170.

(*d*) 33 G. 3. c. 54.

(*e*) 54 G. 3. c. 170.

(*f*) See 2 Bott. 2. pl. 4. & pl. 8.

(*g*) 2 Bott. 1.


(*h*) 2 Bott. 4. pl. 10.

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parish of *A.* being settled in the parish of *B.* and in the removal from *A.* to *B.* the child is born in *C.* there is no doubt that the child would be settled in *B.* because the law considers the question of settlement as if the mother had arrived at the latter parish at the time of the birth. It would be hard that the parishioners of *C.* should suffer from the accidental circumstance of the child being dropt in transitu in their parish.] Then comes the question whether the child in this instance must not be relieved by its mother's parish. It can gain no settlement in the place of its birth, and if it does not acquire the settlement of its mother, it will acquire no settlement any where, and will be entitled to no relief. The provisions of the statute 49 G. 3. c. 68. s. 2. afford a strong argument to shew that the child must follow the settlement of its mother. By that statute it is enacted, "that if any single woman shall declare herself to be with child, and that such child is likely to be born a bastard, and to be chargeable to any parish, township, or *extra-parochial place*, and shall in an examination to be taken in writing, upon oath, before any justice, &c. charge any person with having gotten her with child, it shall be lawful for such justice, upon application made to him by the overseer of the poor of such parish or township, or by any *substantial householder in such extra-parochial place*," to issue out his warrant for the apprehension of such person, &c. Now, at first sight, it might seem from this statute, that the burthen of maintaining a bastard child, born in an *extra-parochial place*, would fall upon the inhabitants of such place, and that a remedy would be given against the putative father. But neither of these consequences follows. No power whatever is given to proceed against the putative father in the case of a bastard born in an *extra-parochial place*; the law not having provided for such a case. It is clear that where a township or extra-

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parochial place does not maintain its own poor, there is no person to whom the maintenance money, which the putative father would be liable to pay, could be paid. But if the Court should hold that the child is settled in the mother's parish, there would be no difficulty in apprehending the putative father, and making him give security for the maintenance of the child. If, on the contrary, it should hold that the settlement does not follow that of the mother, then the putative father is perfectly secure, and the child will have no settlement whatever, nor be entitled to any relief without committing an act of vagrancy (*a*).

Nolan, contra. It is a mistake to suppose that the stat. 49 G. 3. c. 68. is confined in its operation to places where there are overseers to put the law in force against the putative fathers of bastard children. Undoubtedly, in places where there are overseers, they are the only persons who can make the complaint; but it is equally clear, that in extra-parochial places, where there are no overseers, any substantial inhabitant may apply to the justice and obtain a warrant to apprehend the father, and compel him to give security for the maintenance of the child. The argument on the other side, that because a bastard is not settled in the place where it happens to be born, it therefore takes the mother's settlement, cannot be supported. The law recognizes *primâ facie* no settlement of a bastard child, except the place of its birth, and no case has yet occurred in which it has been attempted to make a bastard follow the settlement of the mother, except it has been so provided by particular acts of parliament, as in the instances put on the other side, which are cases expressly excepted from the general rule. It appears to be perfectly clear, from the provisions of


(*a*) See *Rex v. Oakmere*, ante, vol. i. 109.

he 49 Geo. 3. c. 68., that the legislature did not intend the maintenance of bastards, born in an extra-parochial place, to be provided for by the parish in which the mother might be settled. Had such been the intention, no doubt the statute would have contained some provision to that effect; instead of which, it seems to enact the contrary, by giving a remedy against the father to the inhabitants of the extra-parochial place. It is a fallacy to say that the pauper must belong somewhere, and must be removeable to some place, or else perish, unless she be removed to the mother's settlement. It by no means follows that every person in *England* must have a place of settlement to which he is removeable. Hundreds of persons in this country are relieved as casual poor, who have no settlement whatever, and upon this principle, if a bastard pauper have no settlement, he must be relieved as casual poor. In *Rex v. Saughton-on-the-Hill* (a) a pauper, having gained a settlement in a township which afterwards ceased to maintain its own poor, was removed to his previous settlement, and the removal was held bad. On that occasion, *Abbott, -C. J.* said, "there may be many cases where a pauper having no settlement in the place where he may happen to be, may still not be removeable from it, either because he has no settlement at all, or because the parish officers are not enabled to discover the place of his settlement." This is one of those cases in which the pauper is irremoveable. It does not come within the meaning of any of the statutes, either authorizing the removal of paupers, or establishing the various modes by which settlements may be gained, and therefore without some enactment expressly upon the subject, a bastard child cannot be removed to any place, except that of its birth, and where that place happens to be extra-parochial, it is then entirely irremoveable, and

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(a) 2 B. & A. 162.

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must be maintained as casual poor, by the parish in which it happens to reside. On these grounds the order of Sessions must be quashed.

Clinton, on the same side, was stopt by the Court.

BAYLEY, J.(a)—The argument urged in support of the order of Sessions, is founded on the supposition that every person in this country must have some settlement to which he may be removed. That, however, is not so. If those circumstances, which the law says shall confer a settlement, apply to the case propounded, then the party is settled; but if they do not apply, then he is not settled. Foreigners, for instance, coming to this country have no settlement whatever; and bastard children born in an extra-parochial place have no settlement. The instances pressed upon our consideration by Mr. *Clarke*, in support of his argument, are exceptions from the general rule, and are founded either upon some express legislative provision, or some known rule of law, respecting the settlement of bastard children born under certain circumstances. If the mother of a bastard child is laid under constraint, and removed to a place against her will, and is there delivered, the law says that the child shall not be considered as settled in that place; because the mother was not there in the character of a free agent. The legislature presumes in such case, that if she had been left to herself she would have remained in that parish in which she was settled, and consequently that the burthen ought to fall in the place in which it would have fallen in the ordinary course of events but for her removal. This is the principle also which governs in the case of a woman pregnant of a child likely to be born a bastard, and who in the transit to her place of settlement


(a) *Abbott*, C. J. was sitting at Nisi Prius.

is delivered in a third parish, in which case the child is settled, not in the place where it is actually born, but in the place to which the mother belongs, the settlement being suspended until the mother arrives at her destination. None of these cases, however, apply to the case in question. It being, however, my opinion, that in many instances a settlement is no benefit, but a great burthen, to the party, I think there ought not to be a forced separation between the child and the mother. The child is to be with the mother for nurture until it arrives at that period of life when it is capable of contributing to its own maintenance; and though the child is born in an extra-parochial place, yet the mother may carry it to the place where she resides, and retain it for nurture until it is of a sufficient age to leave the parent. In this case I think the illegitimate child is not entitled to a settlement in *St. Nicholas* parish, and therefore the order of Sessions must be quashed.

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HOLROYD, J.—I am of opinion that the child did not gain the mother's settlement by reason of its being born in the extra-parochial place in question. In general an illegitimate child gains a settlement in the parish in which it is born, and not in that of the mother, because it does not gain the settlement of the parents, as in the case of legitimate children. There are, however, excepted cases expressly provided for by act of parliament. One is, where the child is born in a place to which the mother is removed by process of law, in which case the child is considered as settled in the parish to which the mother belongs; and another is, where, pending an order of removal, the mother is delivered in a third parish, in which case, in the eye of the law, the mother is considered as being virtually in the parish to which she belongs, and the child as settled by birth, though not in the

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parish where it is born. But for the case now under consideration there is no legislative provision; and therefore we are bound to hold that this child does not acquire the settlement of its mother, though born in an extra-parochial place.

LITTLEDALE, J.—The general rule of law is, that a bastard child is to be considered as settled in the parish where born. Here is a child born in an extra-parochial place, and therefore does not acquire any settlement. It is for the wisdom of the legislature to pass a law, declaring that in such cases the child shall gain the settlement of the mother; but I do not see why, because this child has gained no effectual settlement, we are to disturb a general principle of law, in order to say that it must be settled in the mother's parish. In most cases people have settlements, but there may be many where no settlement can be acquired. I know of no general rule of law which says, that every native of this country must be settled somewhere, and removeable to some place. This case, at least, is one exception from the general rule, if such exists. There are many cases where the bastard child acquires the mother's settlement, though not born in her parish; but these are cases provided for by various acts of parliament. There are others where, from the necessity of the case, the child acquires the mother's settlement; as where the bastard is born before an order of removal of the mother to her parish can be executed; in which case the child is settled, not where it is born, but in the parish to which the mother belongs. The mother is considered, in contemplation of law, as having arrived at the place to which the order of removal had sent her. This is the principle of 17 *Geo. 2. c. 5. s. 25.(a)* In such cases the child of necessity acquires the mother's settlement; but I can see no reason arising from neces-

(a) Vide 2 Bott. p. 8. pl. 19.

sity, and certainly there is no act of parliament, authorising us to hold that the pauper acquired the settlement of its mother.

Order of Sessions quashed.

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The KING v. JOSEPH SHEARD and Another.

THIS was an appeal against the accounts of the Overseers of the Township of *Soothill*, in the West Riding of the County of *York*, from *April*, 1822, to *April*, 1823. At the hearing of the appeal at the last *Epiphany* Sessions for the West Riding of the County of *York*, the counsel for the respondents objected to the sufficiency of the notice given by the appellants. The Sessions, however, overruled the objection, and proceeded to hear the merits of the said appeal; and struck out certain items in the said accounts, subject to the opinion of this Court upon the following case :

The appellant is a rated inhabitant of the township of *Soothill*, and having at the *October* Sessions, 1823, entered an appeal against the accounts of the respondents, on the *2d January*, 1824, served the following notice upon the respondents :—" Gentlemen, as the solicitor of Mr. *John Twigg*, of the township of *Soothill*, in the West Riding of the county of *York*, a rated inhabitant of the said township, I do hereby give you notice, that at the last General Quarter Sessions of the peace, held by adjournment at *Leeds*, in and for the said Riding, the said *John Twigg* entered an appeal against the accounts of *Joseph Sheard* and *Thomas Tong*, overseers of the poor of the said township of *Soothill*, during the following

A notice of appeal against overseers accounts, stating that the appellant " will object to the following items, or charge of payments, in the said accounts, that is to say," and then setting out the items objected to, without specifying the particular items or grounds of appeal; pursuant to 41 G. 3. c. 23. s. 4. is insufficient.

waiver of due notice of appeal, not having been signified by the respondents or their attorney " in open Court," as required by s. 5. of the same statute.

Where the attornies on both sides signed an admission the day before the Sessions, respecting items in the overseers accounts, objected to by the appellant: Held, that it was not a

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periods, that is to say, from the month of *April*, 1822, to the month of *April*, 1823, sworn to by them before and allowed by two of His Majesty's Justices of the Peace of and for the said Riding, on the 1st day of *October* last, and that at the same Sessions the Court respited and adjourned the hearing of the said appeal to the then and now next General Quarter Sessions of the Peace, to be held by adjournment at *Wakefield*, in and for the said Riding; and I do hereby give you further notice, that the said appeal will be heard and argued at the said last-mentioned Sessions, and that upon the hearing thereof, the said appellant will object to the following items:—

RENTS.

1822.	£.	s.	d.		£.	s.	d.
Grace Rhodes, half year	0	16	0	May 3.	Making out the rate	0	7 6
Edward Senior . . .	1	0	0	June 29.	Expenses at William Der-		
William Goodhall . .	1	0	0		went's, <i>Dewsbury</i>	2	5 6
Sarah Akeroyd, 1 year,					Attending the above	0	3 6
due 1st May, 1822 .	1	14	6	July 8.	Expenses at William Der-		
Judith Kilburne, ½ year	1	6	3		went's	3	4 0
Sure Hargreaves . .	1	17	6		Attending at do.	0	3 6
Betty Redfearn . . .	1	0	0	Aug. 7.	Mr. Wooller, ½ year's salary	6	6 0
William Pindar . . .	1	0	0	Sept. 20.	James Greaves's account	5	11 2
Robert Whittaker . .	2	0	0		Richard Oldroyd's do.	3	10 9½
Rebecca Kilburne . .	0	18	0		Making rate for church-		
George Milner	1	10	0		wardens	0	7 6
Mary Fothergill . . .	1	0	0		J. S. Archer's account	11	15 8
Hannah Watson . . .	1	9	10		David Sheard's do.	3	14 11
Sarah Clough and Rich.					Mrs. Hopkinson's do.	10	10 0
Seeker	1	10	0		Henry Hemmingway's do.	23	8 2
John Newsome	1	7	6		Expenses at signing ac-		
John Wilkinson . . .	0	15	6		counts	4	0 0
George Redlesding . .	0	15	0				
William Blakely . . .	1	0	0				
Mary Carr	1	10	0				
Hannah Senior . . .	0	10	6				
Sarah Hall	1	3	0				
	£25	3	7				

And I do hereby give you further notice, that the said *John Twigg* will insist upon the hearing of the said appeal, that all the said items or charges ought to be struck out of the said accounts, and disallowed; and I do hereby

give you notice to produce, upon the hearing of the said appeal, the said accounts so sworn to and allowed as aforesaid, and all and every the bills, accounts and vouchers, for or regarding the said several sums of money above enumerated and objected to; and also the several rates or assessments, made for the relief of the poor of the said township of *Soothill*, during the year 1822 and 1823. Dated the 2d day of *January*, 1824.

Charles Carr,
Solicitor for the said *John*
Twigg, the Appellant.

To the said Messrs. *Joseph Sheard*
and *Thomas Tong*, and also to the
Churchwardens and Overseers
of the Poor of the said Town-
ship of *Soothill*."

The counsel for the respondents objected to the hearing of the appeal, on the ground that the particular causes and grounds of appeal against the items contained in the said notice, were not specified and stated in the said notice, as directed and required by the statute 41 Geo. 3. c. 23. s. 4.

On the 14th *January*, 1824, the day before the appeal came on to be heard, the attorney for the respondents and the attorney for the appellant entered into the following admissions.

"We do hereby agree to admit, on the hearing of this appeal, that all the payments charged in the accounts of the said respondents, to which the appellant objects, were actually made to or for the use of the several persons to whom the same are charged to be paid, and that the several sums charged in such accounts to have been paid to *J. S. Archer*, *David Sheard*, *Mrs. Hopkinson*, and

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Henry Hemmingway, respectively, were for debts contracted by the overseers of the poor of the said township of *Soothill*, in one or more years previous to the year in which the said respondents were overseers, and were not contracted by the said respondents for the service of their current year; and the respondents undertake to produce, upon the hearing of the appeal, the original accounts and vouchers regarding the items and sums of money objected to by the appellant."

The Court of Quarter Sessions, without expressing any opinion as to the goodness of the notice, considered the admissions as a complete waiver of the objection to the said notice, entered into the merits of the said appeal, and disallowed the four items mentioned in the above admission.

Blackburne, in support of the order of Sessions, contended, first, that the notice of appeal pointed out with sufficient certainty the appellant's objections to the items therein enumerated, in compliance with the statute 41 Geo. 3. c. 23. s. 4.; and second, that supposing the notice to be insufficient, still the respondents had waived the insufficiency, by entering into the admissions stated in the case. The statute 41 Geo. 3. c. 23. s. 4. requires that the particular causes or grounds of appeal shall be stated and specified in the notice; and by section 5. it is provided, that with the consent of the overseers, signified by them or their attorney, in open Court, the Sessions may proceed to hear and decide upon the appeal, although no notice thereof shall have been given. Now, in either view of this case, the Sessions have done right in hearing the merits of this appeal. First, with respect to the notice, all that the legislature requires is, that such information shall be given to the respondents as will enable

them to come prepared to meet the objections stated by the appellant. The statute does not require any particular form of notice, but merely such a notice as will apprise the overseers of the general nature of the objections to their accounts. Reading the whole of the notice set out in this case, the respondents were fully informed of the particular grounds of appeal against their accounts. The whole of the items objected to are set forth: and upon the very face of those items, they are ~~clearly~~ illegal charges for which the township was not liable. For example, the charge of 4*l.* for the expenses incurred at the signing of the overseers' accounts, is clearly objectionable in point of law, and required no specification of the grounds of objection. From the manner in which the accounts were made out, it was impossible for the appellant to give a more specific notice of appeal than was given in this case. But, secondly, the admissions signed by the attornies on both sides, are a complete waiver of all objection to the notice. Those admissions specify distinctly what were the objections which the appellants had to four of the items, upon which alone the Court below decided. Those were items which were clearly disallowable in the overseers' account. The respondents knew very well what the appellant's objections were to these items, and the signing of the admissions was an acknowledgment that they had sufficient notice. On these grounds the order of Sessions must be affirmed.

E. Alderson, and *J. B. Greenwood*, contra, contended, first, that the mere enumeration of the items mentioned in the notice as being objected to, was not sufficient without specifying the particular causes or grounds of appeal as required by the statute; and second, that the admissions which had been signed, were no waiver of the notice, inasmuch as they had not been signified by

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the respondents or their attornies, "in open Court." Upon the first point they cited *Rex v. Mayall* (a), *Rex v. The Justices of Oxfordshire* (b); and upon the second, they relied upon the words of the 5th section of the statute, and cited *Rex v. Horne* (c), and *Henry v. Wilson* (d).

The Court took time to consider of the case, and judgment was now delivered by

BAYLEY, J.—This was an appeal against overseers' accounts, and the Court of Quarter Sessions allowed the appeal, as to four particular items, subject to a case reserved for the consideration of this Court; and the question was whether there had been such a notice of appeal as the statute 41 Geo. 3. c. 23. requires, or if not, whether there had been an effectual waiver of such notice. That statute requires either a notice in writing, or a consent by the overseers, to be signified by them or their attorney in open Court, in order that the Sessions may proceed to hear the appeal, notwithstanding there has been no proper notice given. The statute directs that the notice shall be in writing, and shall be signed by the person giving it, or by his attorney, and that it shall be left at the place of abode of the persons against whose accounts the appeal is made, and the particular causes or grounds of appeal shall be stated and specified in such notice; and then there is a provision that the Sessions shall not examine or inquire into any other cause or ground of appeal than the notice specifies. Now, in this case, the notice which was served before the Sessions, stated that the appellant would object to 35 items or charges of payment, which are specified. The attorney who signs the notice says, "Take notice

(a) Ante, 88.

(c) 4 T. R. 349.

(b) Ante, vol. i. 281.

(d) 5 T. R. 254.

that the said appeal will be heard and argued at the said last mentioned Sessions, and that upon the hearing thereof, the said appellant will object to the following items or charge of payments in the said accounts, that is to say;" and then he enumerates thirty-five different items. When this case came on before the Sessions it appeared that the day before the adjournment day, the attornies on each side met and agreed to admit that all the payments objected to were in fact made, but that four of these were for debts contracted by the overseers in one or more years previous to the year in which the respondents were overseers, and were not contracted by them for the service of the current year, and the respondents undertook to produce upon the hearing of the appeal the original accounts and vouchers regarding the items and sums of money objected to by the appellant. The Sessions expressed no opinion as to the validity of the notice, but they thought that these admissions were a waiver of all objection to the notice; and therefore the questions for the consideration of this Court are, first, whether this was a waiver, and if not, second, whether the notice was a good and valid notice. The fifth section of that statute, in direct terms, declares, in cases where there is not any notice, "That with the consent of the overseers signified by them or their attorney *in open Court*, and with the consent of any other person interested therein, the said Court of Sessions may proceed to hear and decide upon such appeal, although no notice thereof shall have been given in writing, and also that, with the like consent, such Court may hear and decide upon grounds of appeal not stated or mistated in such written notice, where any notice shall have been given in writing." Now as the legislature has pointed out a specific form of waiver, we think we are not at liberty to say that any other form will be sufficient. The statute provides, that the waiver shall

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be, with the consent of the overseers signified by them or their attorney, "in open Court." When the legislature points out one specific mode, we have not the power of saying that any other mode will be equivalent, so as to supersede the necessity of that which the legislature requires. Here there was no signification "in open Court," either by the respondents or their attorney, that the Sessions should be at liberty to proceed upon the appeal, notwithstanding the defective notice, provided the notice was defective; and therefore we are of opinion, that, inasmuch as there was not such a consent in open Court as the statute provides, we are not at liberty to say that any other waiver would let the appellant into evidence of the notice, provided we should think that the notice was not sufficient. Now as to the notice itself, is it possible to say that it specifies the causes and grounds of appeal, in pursuance of the directions of the statute? It states that the appellant objects to these thirty-five items or charges of payment. Why? It is perfectly silent why. It may be on the ground that none of the payments were ever made, and that every one of them is a false charge. Under the supposition that that might be the ground of objection the respondents would probably come prepared to prove the fact of payment; but when they came to Sessions they might find that they had burthened themselves uselessly with such proof, for then they might be told that such was not the point in dispute. Another objection might be, that they ought not to have paid these sums of money. Then they might come prepared, not only to prove that they had in fact been paid, but that they were payments which they were required and bound to make. Again, the objection might be, that though paid, and rightly paid, yet they ought not to be brought to charge against the parish, but ought to be personal obligations on the overseers themselves, and

that the attempt to bring them in charge against the parish was unconscionable. Other grounds of objection might be anticipated, which are not necessary to mention. The act of parliament having required that the appellant shall specify the grounds and causes upon which he objects to the overseers' accounts, it seems to us, that a notice of appeal in which the party contents himself with saying that he shall object to thirty-five items or charges of payment, but does not condescend to state upon what grounds he will object to them, is a defective notice, and consequently that the Order of Sessions in this case, allowing the appeal as to four out of the thirty-five items, ought to be quashed.

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Order of Sessions quashed accordingly.

The KING v. The INHABITANTS of CAWSTON.

AT the General Quarter Sessions holden at the castle of *Norwich* in and for the county of *Norfolk*, on the 17th *July*, 1822, before, &c. an appeal was entered by the Reverend *Augustine Bulwer*, D.D. against a certain rate and assessment bearing date the 3d *June*, 1822, for the relief of the poor of the parish of *Cawston*, the hearing of which appeal was respited till the next sessions; and at the next sessions holden for the said county, the appeal was further respited, on the motion of the appellant, to the sessions to be holden for the said county on the 15th *January* last, when the respondents gave up all opposition to the appeal, having given four days previous notice to the appellant that they would do so; and at the

Where an appeal against a poor's rate was entered at the *Midsummer* Sessions and respited until the *Michaelmas* Sessions, and then further respited, at the instance of the appellant, till the *Epiphany* Sessions, four days previously to which the respondents gave notice that they would not oppose the appeal, and the appeal was accordingly allowed without opposition: Held that the appellant was entitled to costs as upon an appeal which had been "heard and determined" within the meaning of 17 *Geo. 2. c. 38. s. 4.*

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said last named sessions the said rate was quashed on the motion of the appellant's counsel, and the Court allowed to the appellant his costs. The counsel for the respondents contended that the Court had no power to award costs, as the appeal had not been heard and determined, and thereupon the Court granted the respondents a case for the opinion of the Court of King's Bench, as to the question of their jurisdiction in this respect.

E. Alderson, in support of the order of Sessions, was stopt by the Court.

Manning, contra. The Sessions have no power to award the costs of an appeal against a poor's rate, unless the appeal is *heard and determined*. By 17 Geo. 2. c. 38. s. 4. an appeal is given to persons aggrieved in the cases therein mentioned, and the sessions are thereby "authorised and required to receive such appeal, and to hear and finally *determine* the same, &c.; and the said justices may award and order to the party for whom such appeal shall be *determined*, reasonable costs in the same manner that they are empowered to do in case of appeals concerning the settlement of poor persons," by 8 W. 3. Now it cannot be said that this appeal was *heard and determined*. In *Rex v. The Justices of Essex (a)*, it was decided that the Quarter Sessions have no authority to award costs under 17 G. 2. c. 38. unless an appeal has been entered and determined, for the determination of the appeal is a condition precedent to their power to give costs, the words of the act being "may award to the party for whom such appeal *shall be determined*, reasonable costs," &c. and therefore the Court refused a motion for a mandamus to the justices commanding

(a) 8 T. R. 583.

them to hear evidence for the purpose of giving costs against one who, having given notice of appeal against a poor's rate, countermanded it the night before the Sessions. That case is in point; here, a four days notice was given to the appellant, and the respondents need not have gone to the sessions to incur further expense. This appeal has not been heard and determined in the sense and meaning of the statute, and therefore the order of sessions, allowing costs, must be quashed.

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BAYLEY, J. (b)—This case is too plain for argument. The case cited is perfectly distinguishable from this. There the appeal had not been entered; here the appeal was entered, and twice respited; and therefore there is no analogy between the two cases. I am of opinion that this appeal was "heard and determined," in the fair sense and meaning of those words. In the first place, as to the hearing; the appellant was bound to prove his notice of appeal before he could entitle himself to costs, and having done so, that would be a hearing: then, in the second place, the allowance of an unopposed appeal would be a final determination of it, so as to satisfy the words of the statute. It is said that the appellant need not have gone to the sessions, because notice was given four days before, that it was not intended to resist the appeal. If notice had been given by the respondents at the same time that they meant to pay the costs already incurred, then the appellant need not have gone to the sessions; but he is obliged to go there in order to get his costs.

HOLROYD, J.—By allowing the appeal, the sessions "determined" it. Suppose the justices, notwithstanding the respondents' notice that they did not mean to support

(b) *Abbott*, C. J. was sitting at Nisi Prius.

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the rate, entertained a doubt of the propriety of allowing the appeal, and desired to hear what the appellant could say upon the subject, would not that be a hearing? Could it be said, that that was only a hearing on one side, and that both sides must be heard before the costs ought to be allowed? Surely not. I think the order must be affirmed.

LITLEDALE, J. concurred.

Order of Sessions confirmed.

The KING v. The INHABITANTS of WOOLPIT.

Where a pauper contracted in writing for the purchase of two cottages and gardens at the price of 70*l.* and paid 10*l.* on account, at the date of the agreement, but never afterwards paid the remainder of the purchase money: Held, that he had not such an equitable estate as to render him irremovable from the parish in which the property was situated.

JOHN PENNELL, his wife *Susan Pennell*, and their two children, were, by an order of two Justices, removed from the parish of *Woolpit* to the parish of *Combs*, both in the County of *Suffolk*. On appeal the Sessions quashed the order, subject to the opinion of this Court upon the following case:


In *July*, 1819, an estate was offered for public sale, in lots. One lot, consisting of a dwelling-house in two tenements, with gardens, situate in the parish of *Woolpit*, in the occupations of two persons of the names of *Drake* and *Browning*, was agreed to be purchased at the auction by *Thomas Pyman*, for the sum of 76*l.* The estate was sold subject to the following, among other conditions:—
“ Every purchaser shall immediately pay down a deposit, in the proportion of 10*l.* for every 100*l.* for his or her purchase money, to the vendor or his agent, and sign an agreement for the payment of the remainder to the vendor on the 11th day of *October*, 1819, at which time the purchases are to be completed, and the respective purchasers

are then to have the actual possession of their respective lots, except of the cottages, and such lots as are let off, of which the respective purchasers are then to be entitled to the receipt of the rents and profits, all outgoing to that time being cleared by the vendor. Upon payment of the remainder of the purchase money at the time above mentioned, the vendor shall convey the lots to the respective purchasers, each purchaser to prepare the conveyance to him or her. If any purchaser shall neglect or fail to comply with the above conditions, his or her deposit money shall be actually forfeited to the vendor, who shall be at full liberty to re-sell the lot or lots bought by him or her, either by public auction or private contract, and the deficiency, if any, occasioned by such second sale, together with all expenses, &c. shall be made good by the defaulters at this sale." *Pyman* paid the deposit of 7*l.* 12*s.*, and having signed a written agreement for completing the purchase, which was also signed by the auctioneer, as agent for the vendor, he was let into possession, and continued to receive the rents and profits until *July*, 1822. *Pyman* was ready to have paid, and called upon the vendor for the purpose of tendering him the remainder of the purchase money, but some difficulty having arisen as to the title, no conveyance was ever prepared by him. On the 24th *July*, 1822, *Pyman* contracted with the pauper to sell him the said premises for 70*l.*, and the following memorandum of agreement was drawn up and signed by them:—"Mr. *John Pennell* has this day paid Mr. *Thomas Pyman* the sum of 10*l.* in part of the purchase money for two cottages and gardens at *Woolpit*, in *Suffolk*. Mr. *Pennell* agrees to give Mr. *Pyman* 4*l.* for this year's rent of the cottages." No further sum was paid by the pauper, nor was any conveyance executed. On the 28th *July*, *Pennell* obtained leave of a tenant of one of the above cottages, to build a house in the corner of

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the garden. He began to build the house, but never completed it, and never lived on the premises ; but in 1822 put into the house, which had neither doors nor windows, some barrels of beer, which he sold there during the fair at *Woolpit*. On the 2d October, 1822, the pauper, who had become embarrassed in his circumstances, was arrested, and went to prison. On the 21st of the same month he executed a deed of assignment of his personal estate to trustees, for the benefit of his creditors, with a covenant to execute a conveyance of all his real estate, whenever such deed should be tendered to him by his trustees. The deed also contained a covenant, that if there should be any surplus arising from the sale of his estates, real and personal, after the payment of his debts, it should be paid over to the pauper. A short time prior to the 23d December, 1822, the date of the order of removal, the trustees agreed to sell the same premises which the pauper had purchased of *Pyman*, to Mr. *Cobbold*, for the sum of 130*l.*, who subsequently paid the purchase money, and was let into possession. Soon after the execution of the above-mentioned deed of assignment, the pauper, who, since his arrest, had at intervals been deranged, became a confirmed lunatic, and for some time prior to, and on the 23d December, 1822, had been, and was, kept in close custody in the parish, and at the time of the hearing of this appeal was confined in Bedlam. On the 24th July, 1822, when the pauper made the contract with *Pyman*, he resided with his family in lodgings at *Woolpit*, and continued there until he went to prison. His wife and family remained in *Woolpit* up to the time of the execution of the order of removal. The question for the opinion of the Court is, whether the pauper was irremoveable from the parish of *Woolpit* at the date of the order of removal.

Dorer, in support of the order of Sessions. The pauper was irremovable from the parish of *Woolpit*, on the general principle that no man in this country can, by the law of the land, be removed from his own. There are two propositions necessary to make out in the present case; first, that the pauper had such an equitable estate that a court of equity would decree a conveyance, and that consequently he would be irremovable; and second, that, assuming him to have an interest of that description, it was not divested by the act of his trustees in the subsequent sale to Mr. *Cobbold*. It is not contended that the pauper gained a settlement in *Woolpit* by the means stated in the case, but merely that he was irremovable. The first question is; had he an equitable estate in this parish by means of the agreement for the sale of the cottages and gardens, entered into between him and the vendor? According to the rules of equity he clearly had. In *Com. Dig. tit. Chancery* [4. I. 1.] it is said, "that if there are articles for a purchase, the vendor stands seised in trust for the purchaser before a conveyance executed." *Ca. Ch. 39. 2 P. Wms. 629. Payne v. Meller(a), Seton v. Slade(b), Green v. Smith(c), and Broome v. Monck(d)*, are authorities for the maxim, that equity looks upon things agreed to be done, as actually performed. The agreement for sale, therefore, between the vendor and the pauper, must, upon this principle, be considered as a thing actually done, although the conveyance had not been executed. It is clear that if the pauper had paid, or offered to pay, the remainder of the purchase money, he would have been entitled to go into equity to have a conveyance decreed. The agreement operated as a conveyance of a positive interest, and gave him such a possessory right as would, at least, render him irremovable. This is a

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(a) 6 Ves. 349.

(b) 7 Id. 265.

(c) 1 Atk. 572.

(d) 10 Ves. 597.

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much stronger case than *Rex v. Edington* (a), and *Rex v. Horsley* (b), in which last case it was held, that a sole next of kin entitled to take out administration to the intestate, had such an equitable interest in a leasehold tenement of the latter, as to confer a settlement and render her irremovable. The case of *Rex v. Stone* (c), and *Rex v. Staplegrove* (d), are also strong authorities to the same effect. All that is necessary to shew here is, that the pauper was not removeable within the spirit of the statute 13 & 14 Car. 2. as a vagrant intruder into a parish in which he had nothing of his own. If he had any interest whatever, legal or equitable, he would be irremovable upon the spirit of that statute, although the interest would not be sufficient to confer a settlement. This case is distinguishable from *Rex v. Geddington* (e), and *Rex v. Long Bennington* (f), because in each of those cases the struggle was not to shew that the paupers were irremovable, but that they had gained a settlement by reason of the estates then under consideration; and in both, default had been made by the vendees by the non-performance of their respective contracts. Here the only object is to shew that the pauper was irremovable, and here no default has been made, the agreement never having been vacated. This case is also distinguishable from *Rex v. Horndon-on-the-Hill* (g), and *Rex v. Hagworthingham* (h), which were cases of doubtful equity, and where the paupers had merely a personal license, under which no interest passed which was capable of assignment. Then, secondly, assuming that the pauper had such an equitable interest in this parish as to render him irremovable, the question is, whether his interest was divested by the act of his trustees in the subsequent sale to Mr. Cobbold.

(a) 1 East, 288.

(b) 8 East, 405.

(c) 6 T. R. 295.

(d) 2 B. & A. 527.

(e) Ante, 101.

(f) Not reported.

(g) 4 M. & S. 562.

(h) Ante, vol. i. 476.

is clear, that at the date of the order of removal, the pauper himself had done nothing to part with his interest. He had never executed any conveyance of this estate, nor had any ever been tendered to him for execution. It stands, therefore, that whatever interest he had in the estate, still remains in him. The trust deed which he executed, contained a covenant that he should execute such a conveyance, when tendered to him, and although that covenant might be enforced in a Court of Equity, still his interest remains unimpeached. The Court before having determined that the pauper was irremovable, this Court will make every intendment to support that conclusion.

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Storks and *H. Cooper*, contra, were stopped by the court.

BAYLEY, J.(a)—I am of opinion that the order of removals must be quashed. After the decision of *Rex v. Reddington*, which was founded upon *Rex v. Long Benington*, it is quite idle to contend that the mere payment of a deposit upon the purchase of an estate of this description, is sufficient to confer such an equitable estate, as will confer a settlement or render the party irremovable. Those cases have decided that an equitable right is not sufficient to confer a settlement, or make the pauper removable. There must be an equitable estate actually vested to produce these consequences. It is impossible to say that this pauper ever had an equitable estate, or that he had an equitable right; that is to say, he had a right upon the payment of the remainder of the purchase money, to go into a Court of Equity and call upon the vendor for a conveyance. He had an inchoate equitable right, but clearly had not an equitable estate. It never

(a) *Abbott, C. J.* was sitting at Nisi Prius.

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could be predicated of him, that he had a right to go into a Court of Equity, and demand a conveyance of the estate at all events, and say that he was seised in his demesne as of fee, in Equity.

HOLROYD, J.—I am also of opinion, that so far from the pauper having an equitable estate, he had not even a right to go into a Court of Equity until he had tendered or signified his consent to pay the remainder of the purchase money; and if it was refused on the other side, and he had filed a bill in equity, notwithstanding the refusal, the bill, I should presume, would be dismissed with costs. He had no right to go into equity, unless he had done or offered to do all that was necessary on his part to perfect his title.

LITTLEDALE, J.—I am of the same opinion. He had no right to go into equity, unless he did something else, which he had not done.

Order of Sessions quashed. (a)

(a) Vide *Rex v. Northweald Bassett*, ante, 221.

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The KING v. The INHABITANTS of CATESBY.

Where a parish certificate was granted by two persons, who described themselves on the face of it to be, "the only churchwarden, and the only overseer of the poor of the parish:" Held, after a lapse of 63 years, in the absence of evidence to the contrary, that the Court would intend, first, that the parish had by custom but one churchwarden; and second, that there had been originally two overseers, but that one had died, and consequently, that the certificate was valid, as having been granted by a majority of the existing body of overseers, within the meaning of the Certificate Act, 8 & 9 W. 3. c. 30.

TWO Justices, by their order, removed *George Cox*, his wife and their child from the parish of *Badby* to the parish of *Catesby*, both in the county of *Northampton*. On appeal, the sessions confirmed the order, subject to the opinion of this Court upon a case which stated

That *George Cox, Ann*, his wife, and their child *Mary Ann*, were removed by an order of justices from the parish of *Badby*, in the county of *Northampton*, to the parish of *Catesby*, in the same county. This order was appealed against; and on the hearing of the appeal, the respondents produced a certificate, of which the following is a copy:—

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Northamptonshire to wit.—In pursuance of a late act of parliament, intituled “An Act for supplying some defects in the law for the relief of the poor of this Kingdom,” We, *William Goodman*, the only churchwarden, and *Edward Webb*, the only overseer of the poor of the parish of *Catesby*, in the said county of *Northampton*, do hereby certify the churchwardens and overseers of the poor of the parish of *Badby*, in the said county of *Northampton*, that we do own and acknowledge *Thomas Cox* the younger, of *Badby* aforesaid, butcher, and *Mary* his wife, and *Richard, John*, and *Elizabeth*, their children, to be inhabitants legally settled in our said parish of *Catesby*. And we do hereby oblige ourselves, the said churchwarden and overseers of the poor of *Catesby* aforesaid, and our successors for the time being, to receive and provide for the said *Thomas Cox* and *Mary* his wife, and the said *Richard, John*, and *Elizabeth*, their children, and all other the children which the said *Thomas Cox* may hereafter have by the said *Mary* his wife, whenever he, she, they, or any of them, shall become chargeable to the parish of *Badby* aforesaid, or be forced to ask relief of the same, in case he the said *Thomas Cox* and *Mary* his wife, and their children, shall not in the mean time obtain and acquire to him, her, or themselves, a legal settlement in the parish of *Badby* aforesaid, or elsewhere. In witness whereof we, the said churchwarden and overseers of the poor of *Catesby* aforesaid, have hereunto set our hands and seals the 20th day of *May*, in the year of

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our Lord 1761. Sealed and delivered in the presence of us,

Tho. Sterens.
William Claridge.

Wm. Goodman (L.S.)
Ed. Webb (L.S.)

Northamptonshire to wit.—We, two of his Majesty's Justices of the Peace of and for the county of *Northampton*, do allow of the above, and we do also certify that *William Claridge*, one of the witnesses to the signing and sealing of the above-written certificate, has made oath before us, that he did see the churchwarden and overseers of the poor of *Catesby* aforesaid, severally sign and seal the certificate, and that the names of the said *Thomas Stevens* and *William Claridge*, set as witnesses to the sealing and delivery of the same certificate, are of the proper hand writing of the said T. S. and W. C. respectively. Given under our hands the 22d day of *May*, in the year of our Lord 1761.

John Parker. John Andrew.

They also proved that the *Thomas Cox* in the certificate mentioned, had a son named *Thomas*, who was born after the certificate was granted, and that the pauper *George* was the son of such last mentioned *Thomas*. The respondents, in a previous appeal under the same certificate, having given evidence of relief of the said *Thomas Cox* in the certificate mentioned, whilst residing in *Badby*, understood that in this appeal such evidence was admitted by the counsel for the appellant; but the counsel for the appellant do not consider that they made such admission. The question for the opinion of the Court is, whether the certificate above set forth is valid in point of law, inasmuch as it purports to be granted by two parish officers, describing themselves as "the only churchwarden and the only overseer of the poor of the parish of *Catesby*."

Reader, G. Marriott, and Ellis, in support of the order of Sessions. The certificate was originally granted to the grandfather of the pauper, and therefore if the grandson had acquired a settlement in the certifying parish, he would have avoided the certificate, and then *Rex v. Darlington*(a) would come in point, and would govern the present case. But here the son of the certificated person, that is the father of the pauper, has acquired a new settlement, and it is a derivative settlement from him that the pauper now claims. The sole difficulty in this case arises from the introduction into the certificate of the word "only;" for if that had been omitted, *Rex v. Hinckley*(b) would be parallel to, and would decide this case. But taken with this disadvantage, the present falls within the principle laid down in that case, namely, that every thing is to be intended in favor of the certificate; and all that the Court have to intend here is, that two overseers were appointed, one of whom died before the instrument was executed. Undoubtedly, if one only was appointed, the certificate is void; but that cannot be assumed, and it is not proved; the fair presumption is, that two were appointed, that one died, and that the survivor signed the certificate, as he then might legally do. It will be said, that by law every certificate is void which is not signed by two overseers, but there is no foundation for that doctrine. In *Rex v. Clifton*(c), a certificate signed by one overseer was held to be void, but there it was in evidence that only one had been appointed, and that was the ground of the decision there. In *Rex v. Earl Shilton*(d) it was held that the 43 *Eliz. c. 2.* does not require absolutely two churchwardens; and that an indenture binding out a poor apprentice by one churchwarden, where by custom there was but one, and one overseer,

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(a) 4 T. R. 797.

(b) 12 East, 361.

(c) 2 East, 175.

(d) 1 B. &amp; A. 275.



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was good. In that case undoubtedly there was evidence of a custom in the parish to have one churchwarden only, which there is not here; but that may have been the custom in this parish, and after such a lapse of years, and in the absence of proof to the contrary, the Court will, in favor of the certificate, presume the fact to be so.

*Holbeck and Adams* contra. The certificate came out of the custody of the respondents, and therefore the appellants could not be expected to produce any evidence respecting it, especially after the lapse of sixty-three years. The insertion of the word "only" is fatal to the instrument. No reasonable intendment can be made in favor of it. But granting that two overseers were appointed and one died, a certificate signed by one overseer and one churchwarden is bad, because the statutes 43 *Eliz.* c. 2. and 8 & 9 *W. 3.* c. 30. require that it shall be executed by the majority of the legal body. This becomes more manifest upon reference to the 17 *G. 2.* c. 38. which provides for the emergency of the death of one of the parish officers, and empowers the survivors to fill up the vacancy, clearly shewing that until the vacancy is filled up, the survivors cannot perform any legal act. *Rex v. Clifton* and *Rex v. St. Margaret's, Leicester (a)*, are both distinguishable from the present case; because in neither were there any data upon which the Court could found any legal presumption. The argument on the other side rests on the assumption that there were originally two overseers: so that the Court, in order to support this certificate, are asked to intend, most unreasonably, first, that a particular individual was alive, and was appointed to a particular office in the month of *March*, and then that he was dead in the month of *May*.

(a) 8 East, 334.

There is no ground for any such intendment; the word "only" does not convey any idea of survivorship; construed fairly, it plainly indicates that there never had been more than one overseer, and then the certificate, it is admitted, is void. In *Rex v. All Saints, Derby* (a), it was held that the words of the statute of *Elizabeth* were not satisfied by a compulsory binding by two persons styling themselves *churchwardens* and *overseers*, who had been appointed the overseers of the parish at a time when one of them was *churchwarden*; which latter continued the churchwarden for about two months afterwards, when the other overseer was appointed sole churchwarden in his place. In that case there was evidence of the original appointment of both persons as overseers; but still it was held that the description given of themselves in the indentures of apprenticeship would not satisfy the statute. The principle of that case is in point with this. Without a very far-fetched and unreasonable intendment of important facts, and a very unusual and strained construction of the word "only," this certificate cannot be supported; and there is no reason why the Court should travel so far out of the ordinary rules of intendment in this particular case.

BAYLEY, J.—Upon the principle established in several cases it seems to me that this is a good certificate. In *Rex v. Hinckley*, Lord Ellenborough and *Le Blanc*, J., both say, that if any intendment can by law be made to support an indenture of apprenticeship, we must make that intendment. In that case the indenture was produced on one side, and there was no evidence to impeach on the other, and *Le Blanc*, J., says, "the question is, whether by any intendment of law such an inden-

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(a) 13 East, 143.


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ture can be good?" and both Judges say, it might be considered good "by intending that there was a custom in the particular parish to have only one churchwarden." There are two acts of parliament which bear upon this question, and which contain similar language; the 43 *Eliz.* c. 2. s. 5. which relates to parish apprentices, and the 8 and 9 *W. 3.* c. 30. which relates to the granting of certificates. Both these acts require that there shall be the concurrence of the churchwardens and overseers "or the major part of them," to give validity to the indentures and certificates respectively, and therefore decisions upon the one throw a light upon the other; and notwithstanding the statute 17 *Geo. 2.* c. 38. s. 3. which gives to the Justices a power of appointing an additional overseer when one shall die in the course of the year, I think that this case is to be considered as it would have been prior to the period when that act passed. Generally speaking there are two churchwardens in every parish; but, by custom, there may be one only. By law there must be two overseers originally appointed, and an appointment of less than two is, upon the face of it, bad; but if by custom there may be only one churchwarden appointed, and if there be two overseers duly appointed, death may reduce the number to one, and then the question would be whether prior to the statute 17 *Geo. 2.* that churchwarden and that overseer might not do the act in question as constituting the major part of the persons originally appointed. In the case of *Rex v. St. Margaret's, Leicester* there was a very plain and decisive objection to the certificate, because in that case there was only one overseer originally appointed, and it was with reference to that fact, that the language of Lord *Ellenborough* and *Lawrence, J.* there is to be applied. They said that the certificate act 8 & 9 *W. 3.* c. 30. requires that a certificate shall be granted under the hands

and seals of the churchwardens and overseers of the parish, or the *major* part of *them*. It has since been decided in *Rex v. Hinckley* and *Rex v. Earl Shilton*, that though the word in the statute is "churchwardens," yet, by custom, if one only be appointed, that one will be sufficient to satisfy the word churchwardens; but it being clearly by law that less than two overseers cannot be appointed, there must have been originally two overseers; and in the case of *Rex v. St. Margaret's, Leicester*, it was stated as a fact that there was one only. In *Rex v. Clifton* the certificate was stated to be under the hand and seal of J. W. "only overseer of the poor of the township," and therefore the Court decided, not upon the language of the certificate itself, but upon the fact that originally there had been an appointment of one only. The cases of *Rex v. Hinckley* and *Rex v. Earl Shilton* both establish this proposition, that if a certificate, or the binding of a parish apprentice, be by one churchwarden and one overseer, it is good, and it is only because in this case the certificate describes *Edward Webb* as "the only overseer," that we are at liberty to assume that there was originally a bad appointment. Now let us consider the law of presumption, with reference to that point. Are we to presume that it was *non rité actum*? The statute says that the Justices are to appoint two overseers. Are we then to presume that the Justices have deviated from their duty and appointed one only, or are we not rather to presume that two overseers had been duly appointed, and that one of them had died? The law will presume that a party has conformed to the law; and if we are to make any presumption, it is *ut res magis valeat quam pereat*. Between these two, I say, that presumption ought to prevail which assumes that the Justices have conformed to the law; and therefore I think we ought rather to support the instrument than destroy

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it. Upon this principle it appears to me, we are at liberty to assume that in this case *William Goodman* was by the custom of this parish the only churchwarden appointed; that *Edward Webb* was the only surviving overseer, that he duly granted the certificate in the character in which he is described upon the face of the instrument, which he would not have done had he not been regularly and duly appointed; and that we are bound to intend, according to the language of Lord *Ellenborough* in *Rex v. Hinckley*, that there had been originally a good and valid appointment of two, there being no evidence to shew what the appointment was, or to rebut the inference arising from the face of the certificate itself. For these reasons I am of opinion that as against the parish which has granted this certificate, we ought to hold that this overseer was duly authorised to do the act in question, and therefore that the Order of Sessions must be confirmed.

HOLROYD, J.—I am also opinion that the Order of Sessions must be confirmed. I think, upon the authorities which have been cited, and likewise upon the principles which ought to govern us, assuming that the authorities did not exist, that this certificate was good in point of law, or at least that the Sessions might legally draw the conclusion, and intend from the circumstances which appeared in evidence, that it was a good certificate. The certificate was granted on the 17th *May*, 1761, by two persons who were at that time to be taken as the only existing parish officers. It is submitted to by the parish to whom the pauper is sent, as a good certificate, and now after a lapse of 63 years, it is for the first time called in question. If any intendment or presumption can legally be made in favor of the validity of such an instrument, it must be in a case of this description; and

I think that the justices had authority in point of law to presume such facts as would make it a good certificate, assuming such facts to have had existence. That such facts might really exist there seems no doubt; at least upon the authority of the cases cited. It is perfectly clear that by custom there may be only one churchwarden in a parish. There must be two overseers appointed in addition to the churchwardens; and then according to the 43 *Eliz.* c. 2. such persons shall be called overseers of the poor, and are to take charge of them. Now upon the face of this instrument, I think we are to take it, that the person who is called "the *only* overseer" of the poor, was, in point of law, the survivor of two; for unless there had been two persons appointed, who, together with the churchwardens, were to be overseers of the poor, the statute of *Elizabeth* would not have been satisfied. Indeed the description of himself as "the *only* overseer" would not be correct, unless there had been two overseers originally appointed, and therefore it is a fair presumption, arising from the face of the certificate, that he was the survivor of two. Suppose an issue had been directed to try simply whether he was or was not the overseer of the parish; if it was shewn that there had been only one originally, the issue must have been found that he was not the overseer of the parish, and if the onus was to be thrown upon those who are called upon to support the certificate [even assuming that it had been submitted to for an hundred years], it could not by legal intendment be considered a good certificate. I think, however, that the magistrates were abundantly warranted in presuming, as they have done, that there had been an appointment of two overseers originally, and that if there was by custom only one churchwarden, they had a right to presume the fact in favor of the certificate. If so, then the certificate must

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be considered as signed by a majority of those who would be the original existing body. Whether it is absolutely necessary for the purpose of executing their functions, that the majority of the original existing body should continue to exist or not, is a question which we need not decide, because if that was necessary the 17 Geo. 2. would not have been passed, for then, in case the original churchwardens and overseers had been reduced below a majority, as for instance, if there were originally four, and they were reduced to two, all their functions must be at an end during the residue of the year, until that statute had passed. It is, however, unnecessary to decide that question. In this case the Sessions have drawn, as they had a right by law to do, the proper conclusion from the presumption of facts, in holding that this was a legal certificate, and as they have done that, I think we should not be justified in reversing their order. But, independently of what they have done, I am of opinion that, according to the authorities of *Rex v. Hinckley* and *Rex v. Earl Skilton*, we are bound by law to make every intendment that can reasonably be made in favor of the certificate. Acting upon the maxim, "res majis valeat quam pereat," we ought to conclude that this certificate has been legally granted by persons who describe themselves as "the only churchwarden and the only overseer," which the latter person could not have done with propriety unless there had been two originally appointed; and inasmuch as there might have been originally only one churchwarden by custom, we must presume, particularly after an acquiescence of 63 years, that the persons who signed the certificate were a majority of the existing body, and consequently that this was a valid certificate.


LITTLEDALE, J.—I am of the same opinion. Acc

ificate signed by one churchwarden and one overseer alone, would certainly not be sufficient, unless the law would intend something more. But it appears to me, that upon the face of this instrument, we are at liberty to intend those circumstances which are necessary to give it validity. First, with respect to the churchwarden, I think there is no difficulty in intending that he was such a churchwarden as the custom of the parish would authorise, inasmuch as by custom there may be only one churchwarden in a parish. Then, secondly, with respect to the overseer, though a certificate signed by one overseer would be bad, still we are at liberty to assume, from the language of this certificate, that there were originally two overseers appointed, but that one had died after the appointment, and before the certificate was granted. It is said, we are called upon to intend death instead of the continuance of life. So we are; and I think we are at liberty to do so, until the contrary be shewn. But we are placed in the situation of chusing between two intendments, a particular, and a general intendment; first, that a party should be presumed to live when once shewn to be alive; and second, that every thing shall be presumed to be right according to law. Now the question is, which of these two intendments is to prevail; because it is impossible that both can operate. The intendment that every thing is to be presumed to be right according to law, is a general intendment, and, I think, ought to prevail, especially in a case of this description, until the contrary is shewn. In the cases of *Rex v. Clifton*, and *Rex v. St. Margaret's, Leicester*, the question of intendment did not arise, because the facts did not warrant it. There the appointment of one overseer was nugatory, being contrary to the statute. But here, after the lapse of sixty-three years, the description of the overseer may warrant us in presuming an original appointment of two

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overseers, and enable us to intend that one of them had died. The cases of *Rex v. Hinckley* and *Rex v. Earl Shilton*, are authorities to warrant the Court in saying, that every thing must be presumed to be rightly done, until the contrary is proved. So in *Rex v. Morris (a)*, which was the case of an appointment by Justices, of one overseer for a hamlet in a particular parish, in which the question was, whether only one overseer could by law be appointed; Lord *Kenyon* says, "This Court has invariably made a distinction between orders of justices and convictions, and said, that every thing is to be intended in support of the former;" and speaking of the objection there, as to the supposed illegality of the appointment of one overseer, he said, "we are not left to conjecture that no other person was appointed overseer of this place, for it appears on the order of Sessions, that this was an appeal of one of the overseers." Now, when we apply what that learned judge says, to the present case, that every thing should be intended in support of the order of Justices, I think it will justify our opinion on the present occasion. This certificate is a public document, and though not framed by justices of the peace, yet being the act of the parish officers, the Court, for the same reason that it intends every thing in favor of an order of Justices, will intend every thing in favor of an instrument made by parish officers. On the whole, therefore, I am of opinion that this is a valid certificate.

Order of Sessions affirmed.

(a) 4 T. R. 550.



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The KING v. The INHABITANTS of ST. MARY,  
KIDWELLY.

By an order of two justices, *William Williams, Catha-*  
his wife, and their four children, were removed from  
parish of *St. Mary*, in the borough of *Kidwelly*, to  
parish of *Llandevilog*, both in the county of *Car-*  
*then*. The Sessions, on appeal, quashed the order,  
subject to the opinion of this Court, on the following  
points:

The appellants proved that when the pauper was about  
seven years of age, he lived with his father in the parish  
of *St. Ishmael*, in the county of *Carmarthen*; and being  
desirous of being apprenticed to a shoemaker, his father  
consulted with a neighbour, named *John Thomas*, a shoe-  
maker in the same parish, to give him a guinea for teach-  
ing his son the trade of a shoemaker for twelve months,  
his father finding the pauper lodging and every thing else  
during that time. The pauper served the whole twelve  
months under that agreement. There was no indenture  
in writing, but the pauper considered it as an apprentice-  
ship, and his father and master treated and spoke to him  
as an apprentice during such twelve months, and both  
to him there was a guinea paid for teaching him the  
trade. The pauper's father, at the end of the year, came  
to an agreement with *John Thomas*, that the pauper  
should work with him for twelve months, making shoes  
at three pence per pair the first half year, and at four  
pence per pair the remaining half year. The pauper worked  
for *John Thomas* about six months under that agree-  
ment, and then went away and worked at several places,  
till his marriage, which happened in 1785. He soon

Where by a  
parol contract  
the master  
agreed to teach  
the pauper the  
trade of a shoe-  
maker for  
twelve months,  
for which the  
master was to  
receive a gui-  
nea, the pau-  
per's father  
finding him  
board and  
lodging during  
the time; and  
at the expira-  
tion of the  
year, the pau-  
per entered  
into a fresh  
agreement, to  
work with his  
master for  
twelve months,  
making shoes  
at 3d. per pair  
the first half  
year, and at  
4d. per pair  
the remaining  
half year, and  
at the end of  
six months he  
quitted the  
service alto-  
gether: Held,  
that there was  
not a connect-  
ed hiring and  
service, so as  
to confer a  
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afterwards removed to the parish of *St. Mary*, and in the year 1790, one *Owen Roberts*, by an indenture of lease under seal, without livery of seisin indorsed, demised a spot of ground in the parish of *St. Mary*, to the pauper, and his heirs and assigns, for his own, and two other lives, at the yearly rent of 10s. 6d., payable half yearly, on which spot he immediately afterwards built a cottage, in which he lived until the 25th *March* last. About five years ago, the pauper being indebted to a *Mr. Jones*, a currier, for leather, he deposited the lease with him as a collateral security for the debt he owed him. In *January* last, he sold and assigned his interest in the lease to *Mr. Jones* for 40*l.*, in part liquidation of his demand, and agreed to give up the possession on the 25th *March* following, on which day he quitted accordingly, and never afterwards claimed any interest in the lease. The pauper had sold his interest and given up the possession of the house before the order in question was made for his removal to *Llandeilog*. On this evidence the Sessions quashed the order of removal, subject to the opinion of this Court, whether the pauper had gained a settlement by hiring and service in the parish of *St. Ishmael*, or by virtue of the said lease in the parish of *St. Mary*, under the circumstances above stated.

*Nolan* and *D. S. Davies*, in support of the order of Sessions. The question, whether the pauper gained a settlement by estate in *St. Mary's* must be abandoned as too plain for argument; and therefore the only point is, whether he acquired a settlement by hiring and service in the parish of *St. Ishmael*. After the first agreement had expired, there is no doubt that the pauper hired himself for a year in the character of servant, although he only served six months; and the question is, whether the original bargain was for a state of pupilage, or of service in the ordinary acceptation of the word; for if it was the

after, the second service will connect with the former, and then all the requisites of the statute will have been complied with, so as to confer a settlement by hiring for a year, and service for a year. Undoubtedly the 8 and 9 W. 3. c. 30. provides that no person shall obtain a settlement by hiring and service, "unless such person shall continue and abide in *the same service* during the space of one whole year." The meaning of that statute, however, clearly must be, that the pauper shall have served a year in a service of one and the same kind or nature; not that he shall have served a year under one and the same contract or agreement. For this exposition of the act of parliament *Rex v. Dawlish* (a) seems to be an authority, and it seems also to decide that the two services described in this case may well connect, so as to make up a year's service under the second agreement, which was for yearly hiring. In that case the pauper, before the expiration of her apprenticeship, hired herself, and served for a year, the last four months of which were after her indentures had expired; and then hired herself to the same person for another year, but served only ten months: and it was held that the first service (although without the knowledge or consent of the master) might be coupled with the service under the last contract, and that the pauper thereby gained a settlement. The judgment of Abbott, C. J. in that case is expressly in point. His Lordship said, "The first contract was either valid or void; if valid, then there is a good hiring and a good service; if void, then the first year's service will be a service under no contract at all, which, according to the argument, it is admitted, may be coupled with the service under the second hiring." [Bayley, J.—The real question here seems to be, whether the pauper can be considered as serving under the denomination of hired

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service during the time for which he was bound to *John Thomas*, for the purpose of learning his trade.] Undoubtedly that is the point in dispute, and it will be urged on the other side, either that there was no service performed during that time, or if there was, that it was service as an apprentice, and therefore will not connect with the subsequent service under a yearly hiring. But the question, whether there was service, in the proper sense of the word, under the first agreement, is one of fact, and is answered in the affirmative by the Sessions. Besides, it is perfectly clear, from the circumstances of the case, and from the conduct of the parties, that they mutually intended and understood that service was to be performed, and in pursuance of that intention and understanding the pauper did, in fact, serve for twelve months. If the agreement for that service was made, and the service itself performed, as an apprentice, the agreement undoubtedly is void; but the service itself is not the less valid, nor the less competent to be coupled with subsequent service under a valid agreement.(a) [*Holroyd, J.*—The words of the statute are, “shall continue and abide in *the same service.*” At least they must mean service ejusdem generis. Can it be said that the two services here were of the same kind? *Bayley J.*—In *Rex v. Dawlish* there was a year's service after the expiration of the indenture, and during a time when the master had a right to the service of the servant. This is quite a different case; this is the case of teacher and scholar; the relation of master and servant never existed in connection with the first service.]

*Russell* and *E. V. Williams*, contra, were stopt by the Court.

(a) See *Rex v. Shinfield*, 14 East, 541.

BAYLEY, J.(a)—I am of opinion that the pauper did not gain a settlement by hiring and service in the parish of *St. Ishmael*. There is undoubtedly a hiring for a year in the second instance in the character of a servant, and if that could be connected with the preceding contract, a settlement would be gained; but in order to gain a settlement by a connected hiring and service, I take it that the first contract must be for a service under some species of hiring, either for a year, or for an indefinite period; or else it must be a state of things which constitutes the relation of master and servant, and casts upon the latter the obligation to serve, and confers upon the former the right to require service. Now was the relation between the pauper and his master, during the first year, anything more than that of teacher and scholar? If it was nothing more, then it cannot be connected with the service under the second contract so as to confer a settlement. The case of *Rex v. Bilborough*(b) seems to me to be decisive of this case. There the pauper's father agreed with one *Smith* that he should teach the pauper to make stockings during the year next ensuing, and should receive the sum of two guineas for such instruction; and it was further agreed that the pauper should have his earnings, and pay *Smith* for the use of his frame, needles, and other utensils, and for seaming such stockings as the pauper should make. The pauper stayed a year and a half; and therefore if that was a relation of which it could be predicated that there was service performed in the character of servant, it would have been sufficient to confer a settlement; but the Sessions thought there was no settlement, and a case being reserved, this Court confirmed their decision, on the ground that the relation between the pauper and his master was merely that of teacher and scholar, and

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(a) *Abbott*, C. J. was gone to *Guildhall*.

(b) 1 B. and A. 115.

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not that of master and servant. In this case, looking at the first contract from the beginning to the end, there was no obligation on the part of the pauper to serve; he was only to be taught; the master could not, during any part of the time, have called upon him to serve, or have punished him for neglecting to serve, in pursuance of the bargain entered into on his behalf. I take it to be a fixed rule respecting connected services, that although a service under a hiring for a year may be connected with a different species of service, yet there must be an obligation on the part of the servant to serve during the whole length of time which is necessary to confer a settlement. Therefore, inasmuch as in this case there was no relation of servant, and no obligation to serve until the hiring for a year commenced, and there being only a service for half a year under that hiring, no settlement was, in my opinion, gained.

LITTLEDALE, J.(a)—I am of the same opinion. The pauper, during the time he was with Mr. *Thomas*, was a mere scholar, and never stood in the situation of a servant. He performed no service as a servant; he had no obligation upon him to perform any such service; nor had Mr. *Thomas* any right to require it of him. The case, therefore, is in all respects mainly different from *Rex v. Dawlish*.

Order of Sessions quashed.

(a) *Holroyd*, J. went to chambers during the argument.



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## The KING v. The INHABITANTS of AMPHILL.

**TWO** Justices by their order, dated 5th *August*, 1823, removed *J. Asprey* with his wife and five children from the parish of *St. Botolph*, in the town and county of *Cambridge*, to the parish of *Amphill*, in the county of *Bedford*. The Sessions, on appeal, confirmed the order, subject to the opinion of this court on the following case.

The pauper, a rope maker, being previously settled by estate in the parish of *Amphill*, came with his family to reside, at *Midsummer*, 1822, in a house in the parish of *St. Botolph*. He had hired it of one *Mitchell*, for 10*l.* a year. He put his own furniture therein, worth 15 or 16*l.* He continued to live in it above a year, and in *July* last, being much distressed, he applied to the parish officers of *St. Botolph* for relief, who refused to give him any till ordered by a magistrate so to do, after being summoned to shew cause why they did not. They then gave the pauper fourteen shillings on the 31st *July*, according to such order. The tax collector during this month had seized a bed worth 1*l.* for a quarter's tax of three shillings in arrear, and the pauper's wife had sold some furniture, but what remained in the house at this time was worth 14*l.* a circumstance which was not communicated to the magistrate by the overseer when the order for relief was made. The day after this relief, *Mitchell* called for his rent of 10*l.* and gave the pauper a fortnight to pay it in. Soon after this, the pauper and his family were removed to *Amphill* under the above


Merely renting a tenement of 10*l.* a year, without actual payment, will not prevent the removal of the tenant under the 35 *Geo. 3. c. 101.* if he is actually chargeable.

If a pauper, who has the means of paying his rent and sustaining himself and family by the sale of his goods, applies to the parish for relief, and the overseers (without fraud on their part) are compelled by an order of justices to relieve him, he is actually chargeable and removeable if he has not acquired a settlement.

The *bonâ fide* renting a tenement at 10*l.* a year and paying the rent after a pauper has become

chargeable will not confer a settlement under 59 *Geo. 3. c. 50.* *Quere.* Whether the justices at sessions are at liberty to inquire into the real value of a tenement where there has been a *bonâ fide* hiring and actual payment of a 10*l.* rent under the statute



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order of removal. He then applied to one *Furze*, an auctioneer, to buy his furniture, to enable him to pay his rent. *Furze* went to *Cambridge*, valued it at 13/. 3s. (exclusive of his tools, which were worth 5/.) and agreed to buy them for 10/. which sum he paid to the pauper, who kept the key of the house all the time, and returned to it about the 14th *August*, on which day *Mitchell* had sent a person to distrain for the rent; but no distress was taken, because the bailiff, *Furze*, and the pauper went together to *Mitchell's*, and the rent was paid by the pauper with the 10/. he received from *Furze*. Another auctioneer had been employed to sell some of the furniture under the direction, and according to the inventory of *Furze*, and sold it for 3/. 13s.; and after this sale the remainder of the furniture and the tools might be worth 6/. Without the tools the remaining furniture might be worth 1/. The Sessions decided that the house was not of the value of 10/. and confirmed the order of removal subject to the opinion of this court, whether the pauper was liable to be removed from the parish of *St. Botolph*.

*Storks* in support of the order of Sessions. There are three questions intended to be raised on the other side; first, whether the pauper was removeable even though actually chargeable, having been resident on a tenement of 10/. a year at the time of the removal; second, whether the pauper took and rented a tenement of 10/. a year within the meaning of the 59 *Geo. 3. c. 50*; and, third, whether it was competent for the Sessions to go into the question of value in the face of a *bonâ fide* contract for a tenement of 10/. a year. As to the first point, it is perfectly clear, that if the pauper did not rent a tenement within the meaning of the 59 *Geo. 3.* and had actually become chargeable, he was removeable by the 35 *Geo. 3. c. 101*. There is abundant evidence of his chargeability;

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because he had applied to the parish officers for relief, and was relieved accordingly. There is no doubt, therefore, that he was removeable on the ground of his actual chargeability. Then secondly, did he in fact gain a settlement under the 59 Geo. 3.? Merely residing on a tenement of 10*l.*, unless he complied with the requisites of that statute, would gain him no settlement. The 59 Geo. 3. requires a bonâ fide taking of a tenement for one whole year, and the actual payment of a rent of 10*l.* for the whole year. Now, here, the pauper had not paid a year's rent until after the order for removal was executed; and though he subsequently paid it by the sale of his effects, yet that will make no difference, inasmuch as the statute has not a retrospective operation so as to confer a settlement after the party has actually become chargeable and has been removed. Then the third point is equally clear; because although the statute declares that the hiring of a tenement for the sum of 10*l.* a year for one whole year, and the actual payment of the rent, shall confer a settlement, yet the legislature did not mean to preclude the Sessions from going into the question whether the tenement so held was of the actual value of 10*l.* and of deciding against the settlement if it was found to be of less value. This, however, is a point not necessary to decide on the present occasion, it being sufficient to support the order of Sessions, that the rent agreed for was not actually paid at the time of the removal.

*Nolan*, contra, insisted, first, that, assuming the pauper not to have acquired a settlement by renting the tenement in question, still he was irremoveable from the parish of *St. Botolph*, although he had actually become chargeable; second, that the pauper had acquired a settlement under

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the 59 Geo. 3. by renting a tenement, although he had not actually paid the rent until after he had become chargeable; and third, that the Sessions were precluded from going into the question of value, there having been a bonâ fide taking of the tenement at the actual rent of 10*l*. As to the first point; by the old settlement law, unless a person came into a parish in a state of vagrancy he was irremoveable; but in consequence of the inconveniences resulting from this in practice, the statute 13 and 14 Car. 2. c. 12. was passed, which rendered persons removeable within forty days who were likely to become chargeable if they came to settle upon a tenement under the yearly value of 10*l*. So that by that statute if a person resided on a tenement of 10*l*., whether chargeable or not chargeable, he was not removeable; and if he was not removed within the forty days, though he resided on a tenement under 10*l*. the same consequence would follow. Then followed the 35 Geo. 3. which recognizes the provisions of the preceding statute, by which it is expressly provided, that the party shall not be removeable though he has not gained a settlement, unless he has actually become chargeable. The cases of *Rex v. Leeds* (a) and *Rex v. Martley* (b) are authorities founded upon the principle now contended for, and shew that during the existence of a contract for a tenement of 10*l*. a year, a pauper is not removeable though chargeable. It is clear, therefore, that this pauper was irremoveable though chargeable. The statutes 7 Jac. 1. c. 3. and 3 W. & M. c. 11. which prevented persons from gaining settlements unless they gave notice of their coming into the parish, do not affect the question as to the removeability, and therefore this question must be

(a) Burr. S. C. 524 S. C. 2 Bott. 468.

(b) 4 Burn, 534. See *Rex v. Fillongly*, 4 Burn, 495. *Rex v. Framlington*, Id. 471. and *Rex v. St. Paul, Deptford*, Id. 472.

considered as it would have been under the 13 and 14 *Car.* 2. and 35 *Geo.* 3. But independently of this construction of the statute this pauper cannot be considered as in a state of actual chargeability; for at the time he applied for relief he had abundance of property to satisfy his rent and sustain himself and family; and consequently he was not removeable as a person actually chargeable, for it was the duty of the overseers to see that he was a person in want of relief. Then secondly, the pauper had in fact acquired a settlement independently of the question of his irremoveability. He had not only taken the house for a year, but he actually paid the rent within the meaning of the 59 *Geo.* 3. c. 50. It is true the rent was not paid until after he was removed; but still that will make no difference in the fair construction of the statute, the object of which was to prevent the fraudulent acquirement of settlements in a parish, by taking a tenement of a rent of 10*l.* per annum, which the party had not the means of paying. Now in this case although the pauper labored under temporary distress, still he had sufficient means of paying his rent, and in fact paid it. The landlord did not apply for his rent until the day after the relief was applied for, and then he gave the pauper fourteen days to pay it in. He paid it within the fourteen days by the sale of his effects, and therefore he was at least in the state of having an inchoate right of settlement at the time he became chargeable, which was afterwards perfected. Then thirdly, the Sessions had no right to go into the question of value. It is sufficient under this statute that there shall have been a bonâ fide taking of a tenement at the rent of 10*l.*; and therefore the Sessions were precluded from entering into the value, unless there was any reason to suppose that there was fraud in the contract,

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Here none was suggested, and no doubt was entertained that there was a *bonâ fide* hiring. The very object of the statute is to prevent the agitation of questions of value, and to save the enormous expense which had been so frequently incurred in cases of this nature before the legislature interfered. If, notwithstanding that statute, the Sessions are still to be at liberty to inquire into the value of a tenement, where there has been a *bonâ fide* taking, and an actual payment of 10*l.*, the act will become a dead letter, and the Sessions will be again harassed by an innumerable class of cases which it was the object of the legislature to set at rest. On these grounds the order of Sessions cannot be sustained.

BAYLEY, J.—I do not think it necessary to decide, (although I may entertain an opinion on the point,) that where the rent actually amounts to 10*l.*, but the Justices have found that the annual value is less than that sum, a settlement will or will not be gained; but as far as I can at present form a judgment, I would say, that the previous acts of parliament, which declare that the tenement shall be of the value of 10*l.*, are not affected, upon the question of value, by the 59 *Geo. 3.*, and that the latter statute does not supersede the necessity which previously existed of proving the actual value. But independently of that point, I am of opinion that this pauper was removable, notwithstanding the fact of his renting a tenement of 10*l.* at the time he became chargeable, and that he had not gained a settlement in the parish of *St. Botolph*. It is very material to attend to the date of the order of removal. Mr. *Nolan* says that the pauper was not chargeable, because he had property of his own which might have been applied to his own maintenance before he received relief from the parish; and that although the parish

lid in point of fact relieve him, yet he was not actually chargeable within the meaning of the 35 Geo. 3. c. 101. But it appears to me, that if the parish officers did not act fraudulently, and if they, by an order of Justices, are compelled to relieve the pauper, (and it does not appear here that they knew he had any means of supporting himself,) and a charge is actually brought upon the parish for the purpose of maintaining him, we are bound to hold that he was actually chargeable within the meaning of that statute. Let us attend to the history of the law, with reference to the power of removing a pauper. It is contended, that although this pauper might not have gained a settlement, still he was not removeable. The statute 13 and 14 Car. 2. says that, if a person comes to settle upon a tenement of less than the value of 10*l.*, he shall be removeable within forty days, if he is likely to become chargeable; and it is now insisted, that after those forty days are expired, he would be irremoveable. But we are to see what alteration has been made in the law in that respect by the 35 Geo. 3. c. 101. That statute recites the 13 and 14 Car. 2., and takes away the power of removing persons who are likely to become chargeable, and declares that the parish officers must wait until the pauper is actually chargeable; but when he is actually chargeable, then, the legislature says, "in which case two Justices of the Peace are hereby impowered to remove the person or persons in the same manner, and subject to the same appeal, and with the same powers, as might have been done before the passing of this act with respect to persons likely to become chargeable." I take the meaning of these two statutes together to be this; that supposing, under the 13 and 14 Car. 2., a person could not be removed who was likely to become chargeable, unless the proper steps were taken for that purpose within forty days, the 35 Geo. 3. has taken away

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from the Justices the power of removing on the ground of being likely to become chargeable; but if at any period of the year the person becomes actually chargeable, then he is liable to be removed, as he might have been under the previous statute, whether the forty days had or had not expired. That being the case, a person who is become chargeable is, at all events, liable to be removed, unless he has obtained a settlement in the parish in which he happens to be. The 59 Geo. 3. c. 50. introduces a new legislative provision respecting the acquisition of a settlement by renting a tenement. Inasmuch as before that act, by a residence upon a tenement of the value of 10*l.*, a person acquired a settlement if he only resided for forty days, though he had only paid part of the rent, this statute introduces new regulations, and provides, among other things, "that no person shall gain a settlement in any parish or township by renting a tenement, unless such tenement shall consist of a house or building, being a separate and distinct dwelling-house or building, bonâ fide hired at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building shall be held and occupied, and the rent for the same actually paid, for the term of one whole year at the least, by the person hiring the same." Now this pauper took a tenement at *Midsummer*, 1822, and resided in it for a year, and a year's rent became in arrear. At the conclusion of his year he might have made a tender of his rent upon the premises at sunset or the last hour of the day, and that would probably be considered as equivalent to an actual payment. There are many cases in which the law considers a tender as equivalent to payment, but the party must be always ready to make the payment when it is due. Here the rent was due at *Midsummer*, 1823. In *July* of that year, and before he had actually paid any rent, he applies to

the parish for relief, and actually becomes chargeable. Was he settled at that time? No; because, according to the words of the act of parliament, he had not then actually paid the rent for the term of one whole year, and consequently he had gained no settlement. On the 5th of *August* following he is actually removed by an order of Justices. There is an appeal against that order; what is the ground of the appeal? Because at that period he was not removeable. Had he acquired a settlement at that period? No, he had not; for no rent had been paid at that time. The payment of the rent afterwards does not make the previous order of removal by the Justices a bad order; he is removed to another place, not having done any act to obtain a settlement in the place from whence he was removed. For these reasons it appears to me that the order of removal was good; that the Sessions did right in confirming it, and that their order ought to be confirmed.

HOLROYD, J.—I am of the same opinion. In order to gain a settlement by renting a tenement, the 59 Geo. 3. c. 50. requires certain things to be done which were not requisite previously thereto. One of those things appears to me not to have been done by this pauper in order to gain a settlement in the parish where he was actually residing and renting a tenement at the time the order of removal was made, namely, the actual payment of a year's rent. It appears that the rent had not been paid at the end of the year, nor had any attempt been made to pay it. It is true that the landlord gave him a fortnight to pay it in, but there was no actual payment nor any thing done which can be considered in law as an actual payment. That being the case, no settlement appears to have been gained by the renting of the tenement. Without determining the objection as to the find-

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ing of the Sessions, that ~~this~~ tenement was under the value of 10*l.*, I think it is sufficient to give our opinion upon the foundation that the rent was not actually paid at the time the order of removal was made. Subsequent payment of rent does not by retrospect gain a settlement under 59 *Geo.* 3. after a pauper has actually become chargeable, and has been removed.

LITTLEDALE, J.—We need not decide whether the Sessions were at liberty to inquire into the actual value of the tenement, or whether they were bound by the actual contract to pay 10*l.* a year; for it appears to me that since the 59 *Geo.* 3. this person did not gain a settlement, inasmuch as the act directs that no settlement shall be gained until the rent is paid. Now the rent here was not paid until 14 days after the pauper was removeable. He was removed on the 5th of *August*, and at that time he had not gained a settlement. If he had not then gained a settlement, the subsequent payment of rent would not gain him one retrospectively. If he is once well removed, the subsequent payment of rent could not invalidate the order; and it appears to me that he was actually chargeable, though he had property enough to pay his rent. The parish officers were summoned to shew cause why they did not relieve him, and having in fact been compelled to pay him fourteen shillings, he was actually chargeable, and was capable of being removed under the 35 *G.* 3. c. 101.

Order of Sessions confirmed.



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## The KING v. The BREWERS' COMPANY.

**THIS** was a return to a mandamus which issued in *Hilary* Term last, directed to the defendants, lords of the manor of *Williotts*, in the parish of *South Mims*, in the county of *Middlesex*, and to the steward and deputy steward of the said manor, commanding them to admit *Robert Fossick* to a copyhold tenement, consisting of a messuage or inn, called the *White Hart*, two cottages, and several parcels of land, holden of the manor, as tenant thereof, and to accept the surrender by the said *R. F.* of the said tenement, &c. to the use of *Martha Winter*, to secure to her the sum of 1000*l.* and interest, according to the custom of the manor. The writ stated that in or about the year 1778, *Hannah Lofty* the younger was admitted tenant to the premises in question; that she afterwards surrendered them to the use of her will; that by her will, dated 4th *February*, 1779, she devised them to her mother, *Hannah Lofty* the elder, for her life, after her death to *Edward Fage* and *Mehitabel* his wife, for their lives, and after their deaths, to their child or children, their heirs and assigns, for ever; that the testatrix then devised all the residue of her estates whatsoever and wheresoever to her said mother, her heirs and assigns, for ever; that the testatrix died seised of the premises on the 2d *March*, 1779; that her mother was admitted tenant for her life, and, being seised, by her will, dated 3d *May*, 1786, devised them to her niece *Mehitabel Fage*, her heirs and assigns, for ever; that *Edward Fage* and *Mehitabel* his wife were admitted tenants; that *Mehitabel Fage* survived her husband and all their children, and on the 17th *February*, 1821, died seised of the premises, without issue, and without making any will; that *Robert Fossick* is the brother and heir at law of *Mehi-*

Where a person, claiming as heir at law of the tenant last seised of a copyhold, was refused admission by the lord, and a mandamus issued, but the lord in his return thereto did not deny the heirship, except argumentatively, the Court ordered a peremptory mandamus to go.

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*tabel Fage*, and also heir at law of *Hannah Lofty* the elder; that at a Court Baron held on 10th November last, and on several subsequent occasions, *Robert Fossick* applied to be admitted to the premises, and to be allowed to surrender the same to the use of *Martha Winter* to secure to her the sum of 1000*l.* and interest, which she had advanced him on the security thereof; but that the defendants have absolutely refused and neglected and still do refuse and neglect to admit him and to accept his surrender. The return stated, that at a Court Baron held 8th July, 1778, *Hannah Lofty* the younger was admitted tenant to the premises, as only sister and heir at law of *Ezekiel Lofty*, deceased, to hold to her, her heirs and assigns, for ever, and at the same Court surrendered them to the use of her will; that at a Court Baron, held 24th July, 1780, it was presented that she had died seised of the premises since the last Court, and that by her will, dated 4th February, 1779, she devised the premises to her mother, *Hannah Lofty*, for her life, after her death to *Edward Fage* and *Mehitabel* his wife, for their joint lives and the life of the survivor, and after their deaths to their child or children living at the death of the survivor of them, their, his, or her heirs and assigns, for ever; that at the same Court the said *Hannah Lofty* the mother was admitted tenant to the premises, to hold to her for her life; that at a Court Baron, held 26th June, 1787, the death of the said *Hannah Lofty* the mother was presented; and that at the same Court the said *Edward Fage* and *Mehitabel* his wife were admitted tenants to the premises, to hold unto them and the survivor of them, during their joint lives and the life of the longest liver of them; that at a Court Baron, held 10th November, 1823, it was presented that *Mehitabel Fage* the wife, and afterwards the widow of *Edward Fage*, died since the then last Court, but whether she left any

child or children, her surviving, was unknown; that at three several general Courts Baron held 10th *November*, 1823, and 3d and 27th *April* last, three several proclamations had been made for the child or children of the said *Mehitabel Fage* by the said *Edward Fage*, her late husband, to come into Court and be admitted to the premises under and according to the will of the said *Hannah Lofty* the younger; but no one came, and such default had been recorded; that under the residuary clause in the will of the said *Hannah Lofty* the younger, whereby she devised all the residue of her estates, of what nature or kind soever or where-soever, unto her said mother, *Hannah Lofty*, her heirs, executors, administrators and assigns, for ever, the reversion in fee in the premises descended upon the customary heir of the said *Hannah Lofty* the elder; that at the said Court Baron, held 27th *April*, the first proclamation was made for the heir at law, or customary heir of the said *Hannah Lofty* the elder, to come into Court and be admitted to the premises, or in default thereof, the same would be seised into the hands of the lords of the manor for want of a tenant; that at the same Court, *Daniel Fossick* came and claimed, as he had before done, when the proclamations were made for the child or children of *Mehitabel Fage*, on behalf of his father, *Robert Fossick*, as customary tenant of *Hannah Lofty* the elder, and likewise as heir at law of *Mehitabel Fage*, and produced certain cases relative to the construction of the will of *Hannah Lofty* the younger, with counsel's opinion taken thereon, and also certificates verified by the affirmation of the said *Daniel Fossick*. The certificates were then set out, stating, that *Mehitabel Fossick*, daughter of *Robert Fossick* and *Mehitabel* his wife, was born the 1st day of the 12th month, 1755; and, that *Robert Fossick*, son of *Robert Fossick* and *Mehitabel* his

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wife, was born on the 12th day of the 7th month, 1765. The return proceeded to state, that at the same Court came *Elizabeth Sine*, late *Elizabeth Fossick*, spinster, by *Henry Schultes*, her attorney, and claimed to be admitted to the premises, first, as only surviving sister and heiress at law, according to the custom of the manor, of *Mehitabel Fage*, who was the last tenant; second, as one of the nieces and co-heiresses of *Hannah Lofty*, the elder; third, as only surviving legal representative of *Robert Fossick* and *Mehitabel* his wife; and in support of the claims of the said *Elizabeth Sine*, the said *Henry Schultes* stated, that the register of the birth of *Robert Fossick*, on 12th July, 1765, had been fraudulently inserted in the register book from whence the certificate was taken, and was destitute of the formalities requisite to authenticate it; he also stated the said *Robert Fossick* to be illegitimate; that at the same Court came *Mary Moreton*, and claimed to be admitted to the premises, alleging that *Robert Fossick* was illegitimate, but not questioning the legality of the claim made on behalf of *Elizabeth Sine*; that after considering the claims of the different parties, the said Court Baron were of opinion that *Elizabeth Sine* had shewn a colorable title to the premises, and ought to be admitted thereto, and she was accordingly admitted, and paid for a fine 160*l.* and her fealty was respited. To this return *Robert Fossick* demurred.

*R. Bayley*, in support of the demurrer, was stopt by

*The Court's* intimating, that the fact of the defendants having admitted another party, could not operate so as to conclude the present claimant.

*Chitty*, contra. *Robert Fossick*, claims as heir, and therefore he must establish his title in that character in

a Court of Equity; he cannot come to this Court for a mandamus to the lord to admit him. [*Bayley, J.* The return does not deny the fact that he is the heir, which it ought to do; it is essential to the validity of a return, that it should be certain, which this is not.] *Rex v. Rennett* (a) is an authority for saying that a copyholder, who claims by descent, cannot proceed in the course adopted in this case; this Court will not interfere by mandamus to assist an heir at law; his proper remedy is in Chancery. [*Bayley, J.* It is stated in the writ, that the heir at law wishes to be admitted for the purpose of raising money upon the estate; is not that a legitimate subject for our interposition on his behalf?] Certainly not, because he cannot legally raise money upon the estate, until he has been put in possession by regular course of law (b). [*Holroyd, J.* The case of *Rex v. Rennett* is very distinguishable from this; the only reason why the Court there refused to interfere was, that their interference was not necessary to the interests of the heir.] Nor is it here, and therefore the same reason will dictate the same course of proceeding. [*Bayley, J.* Suppose the heir wishes to devise the estate; his will would not be operative for that purpose until he has been admitted, and therefore our interference may be necessary to his interests.] Claiming as heir, his will, devising the estate, would be operative, even before his admission and surrender to the use of his will; though it certainly would not if he claimed as devisee. *Doe v. Danvers* (c), *Rex v. Hendon* (d).

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BAYLEY, J.—The Court have in this, as in other cases, a discretionary power, to grant or withhold a mandamus, according as the justice, of the case and the

(a) 2 T. R. 197.

(c) 7 East, 299.

(b) *Watkins* on Copyholds.

(d) 2 T. R. 484.

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interests of the parties seem in its judgment to require. If, as seems to be the drift of the present argument, the present claimant obtained the writ upon a representation that he was entitled as devisee, and has framed it, and now demands admission, as heir, the defendants might have defeated that scheme by moving to quash the writ. It is, as I have already suggested, a settled rule, that a return to a mandamus must be certain and explicit in its language, and above all, that it must not be argumentative; *Rex v. Lyme Regis*(a). Upon that ground, I am decidedly of opinion, that this return is bad; it does not deny that *Robert Fossick* is the heir at law; it does not assert that he is illegitimate; it only reasons upon the subject, which is a fatal defect. The act of admitting this person tenant, will not confer upon him any title as against the lord, because he has admitted one person already, and therefore has done all that he can to weaken his own title, if it could be weakened by such means. Upon the short ground, therefore, that this return is bad for argumentativeness and uncertainty, I am of opinion that it must be quashed, and that the peremptory mandamus must issue.

HOLROYD, J.—This return is clearly insufficient, and must be quashed. Whether the Court will, or will not, in a case like the present, grant a mandamus where the title of the claimant is not clearly made out, is not now a question growing out of this case, and does not require any opinion or the declaration of any general rule from us. A sufficient ground has already been shewn to induce the Court to grant the first writ, and therefore the defendants, having been heard on that occasion, cannot now object to the course then adopted(b); all that it was open to them to do, was either to comply with the

(a) Doug. 182.

(b) 5 T. R. 66.

first writ, or to give a good legal answer to it; and as they have done neither, a peremptory mandamus must go(a).

Rule absolute for a peremptory mandamus (b).

(a) *Abbott*, J. was sitting at Nisi Prius; and *Littledale*, J. was absent.

(b) Vide 2 Cro. 368. 2 Rol. 274. 6 East, 431. 2 M. & S. 87. Com. Dig. G. 2. 5. 7. 10. 1 Rol. 505. 1 Leo. 100. 3 Id. 221. 4 Id. 31. 4 Co. Rep. 22. Id. 26 b.

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TWO Justices, by their order, removed *Henry Scotney* and *Rebecca* his wife, from the parish of *Apethorpe*, to the parish of *Sudborough*, both in the county of *Northampton*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court, upon the following case:


The pauper, *Henry Scotney*, being settled in *Apethorpe*, was hired, about six years ago, by a Mr. *Gilby*, of *Brigstock*, for a year, to commence at old *Michaelmas*, the whole of which service he performed in *Brigstock*, sleeping also in that parish. Before the expiration of the year, Mr. *Gilby* again hired the pauper from the following old *Michaelmas* to the new *Michaelmas* succeeding. There was no interruption of service, and under the second hiring the pauper served his master about half a year in *Brigstock*, and then removed with him to *Sudborough*, in which latter parish he finished his service under such second hiring, and slept the last forty nights in *Sudborough*. The question for the opinion of the Court is, whether the pauper acquired a settlement by hiring and service in the parish of *Sudborough*.

Where a pauper hired himself and served for a year, in the parish of A., and just before the expiration of that year he hired himself again for a second year, and after serving six months under that hiring, he went with his master into the parish of B., and there served out the remainder of his second year, sleeping there the last forty nights: Held, that he did not acquire a settlement by hiring and service in the latter parish under the stat.

3 & 4 W. & M. c. 11.



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*Holbech and Adams*, in support of the order of Sessions The pauper did not acquire a settlement by hiring and service in the parish of *Sudborough*. The 3 & 4 *W. & M.* c. 11. s. 7. provides, that if any unmarried person, not having child or children, shall be lawfully *hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement therein*. In order therefore to confer a settlement, there must be a hiring for a year into the parish, and some service in the parish under that hiring; and where a pauper has served a whole year under a yearly hiring in one parish, and then removes without making any new agreement into another parish, a year's service there will not confer a settlement, because there is no hiring into that parish within the meaning of the statute. *Rex v. Crocombe* (a) appears at first sight opposed to this argument, but that case will on examination be found distinguishable from the present, because there the Court decided that there was a settlement in the second parish, upon the ground that they might presume a new hiring into that parish (b). *Rex v. St. Giles, Reading*, (c) shews that the Court, in *Rex v. Crocombe*, acted upon the presumption either of a continuance of the old contract, or the formation of a new one, and that where there is no such presumption, and no express hiring, no settlement can be gained. *Rex v. Fillongley* (d) decided that a service under a hiring for fifty-one weeks may be coupled with a service under a previous hiring for a year, so as to confer a settlement; but there both the services were performed in the same parish, and therefore there was, in the language of *Bayley, J.*, "a hiring for a year, and a service for a year,

(a) Burr. S. C. 256.; 2 Str.  
 1240. S. C.

(b) 1 Nol. P. L. 426.

(c) Cald. 54. S. C. 2 Bott. 435.  
 (d) 1 B. & A. 319.

sufficient to confer a settlement." Forty days residence will not confer a settlement unless they come within the scope of the year for which the party is hired; *Rex v. Denham* (a); which in this case they do not; for, as the Court there said, "it would be neither reasonable, nor expedient, that an inquiry should be gone into over a long period of time, at detached intervals, to ascertain a settlement." [*Bayley, J.* Is not *Rex v. Alton* (b) directly in point, and is it not decisive against the settlement here?] It certainly is, and therefore whether considered with reference to the words of the statute, or the decided cases, it is plain that there was no hiring into the parish of *Sudborough*, and consequently no settlement gained there.

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*G. Marriott and Humfrey, contra.* According to the view taken of the statute by *Lee, C. J.*, in *Rex v. Croscombe* (c), the pauper has gained a settlement in *Sudborough*, because he served there under a continuing yearly hiring, and slept the last forty nights there. It was said by that learned Judge, that he could not distinguish the case then under consideration "from the cases cited, of a hiring for a year and a service for a year; which is holden to gain a settlement, though the service be *not under the same hiring*; and he thought it quite indifferent in what PARISH the service was, since it was the same SERVICE." So in *Rex v. Ashton* (d), a servant maid was hired for a year in the parish of *Ashton*, where she served half a year; then her master, and she with him, removed to the parish of *Patshall*, where he took another farm, and where she continued with him for the


(a) 1 M. & S. 222.

(b) Cald. 424.; 2 Bott. 382.

(c) Burr. S. C. 256.

(d) 2 Const. 273. See *Rex v. Brighthelmstone*, 5 T. R. 188.

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other half year. The Court said, a settlement was gained in *Patshall*, because, "Here is what the act requires, a hiring for a year and a service for a year. For it is the same service; and the statute doth not tie it down to one place. If a person is hired to a master in one parish, and goes with him into another parish, and serves him for one whole year, the parish he continues in last for forty days before the end of his year, is the place of his settlement: and the reason why the forty days gain a settlement is, because he comes there with his master, and you cannot remove him from his master, and having continued with him forty days unremoveable, he gains a settlement." It seems impossible to distinguish these cases from the present, therefore the pauper gained a settlement in *Sudborough*.


BAYLEY, J.—I think this case was properly disposed of at the Sessions. If we were to hold that service in a second parish, without any yearly hiring, or under a yearly hiring into a former parish, would confer a settlement, the result would be, that a servant who lived twenty years in twenty different parishes with the same master under one original hiring, or even under different weekly hirings, so that he was originally hired for a year, would be settled in that parish in which he happened to reside the last forty days; which would be equally subversive of the statutes, and of all the decided cases on the subject. *Rex v. Crocombe* has no bearing upon the present case, because the ground of decision there was, that the Court construed the second contract as a new yearly hiring, and connected the services in both parishes; whereas here there is no second contract, and no new yearly hiring. The same view of that case was taken by *Willes, J.*, in *Rex v. St. Giles's, Reading*, where he says, "secondly, because the Court did there presume the

continuance of the old contract. Here the pauper was incapable of making a new contract at the commencement of the second year : presumption can go no further ; and at that time he was a married man. In this case, suppose at the end of the first year a new agreement had been made between the master and servant ; a service under that could not have given the pauper a settlement. Shall he then, by an implied contract, do that which in express and direct terms he could not do ? If the original hiring were constructively to be continued throughout the second year, it might last for twenty years ; and parishes, on such a construction as is contended for in support of these orders, might be burthened, by retrospect, with families from whose labour they had received no benefit." This case, therefore, rests entirely upon the statute of 3 & 4 *W. & M.* c. 11., and the only question is, whether this pauper was "hired into" the parish of *Sudborough* "for one year," within the letter or spirit of the act. I am clearly of opinion that he was not, and therefore that he has not acquired a settlement there. The statute 8 & 9 *W. & M.* c. 30. does not assist this case, because though it was passed to explain the former statute with respect to the nature of the service required, its effect is rather to narrow than to extend the power of obtaining settlements. The order of Sessions must be confirmed.

**HOLROYD, J.**—It is quite clear that this pauper acquired no settlement in the parish of *Sudborough*. The effect of *Rex v. Croscombe* was, either that the original hiring was by the agreement of the parties continued into the second parish, or that, by construction of law, there was an implied yearly hiring into the second parish ; and any thing that was thrown out by the Court beyond that, was extra-judicial, and must not be considered as binding

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upon us in a different case. The construction of the statute referred to, as given by *Lee*, C. J., in *Rex v. Croscombe*, is not consistent with the other authorities, and cannot be supported upon sound principles of law. The 13 & 14 C. 2. c. 12. empowered the Justices to remove any person to the place where he was last legally settled as a servant for the space of forty days; the 1 J. 2. c. 17. provided that the forty days continuance should not make a settlement, but from the time of delivering notice in writing: and the 3 & 4 W. & M. c. 30. s. 6. enacted, that if any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement therein, though no such notice in writing be delivered. It is perfectly plain, that such service must mean service under a yearly hiring into the parish where it is performed; but as doubts were entertained upon the subject, the 8 & 9 W. & M. c. 30. removed all ambiguity, by declaring that no person hired into any parish or town for one year, shall be adjudged or deemed to have a good settlement in any such parish or township, unless such person shall continue and abide in the same service during the space of one whole year. The result therefore is, that, in order to confer a settlement in any parish by hiring and service, there must be a yearly hiring into, and some service under that hiring, in that parish. Here there is no yearly hiring, expressed or implied, into the parish of *Sudborough*, and consequently no settlement is conferred(a).

Order of Sessions confirmed.

(a) *Abbott*, J. was sitting at Nisi Prius; and *Littledale*, J. was absent.




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BY an order of two Justices, *James Fletcher*, his wife, and their three children, were removed from the parish of *Benniworth* to the parish of *Calcethorpe*, both in the county of *Lincoln*. On appeal, the Sessions quashed the order subject to the opinion of this Court, on the following case :

In the year 1803, the pauper, *James Fletcher*, then a married man, was hired by yearly hiring, as a confined laborer in husbandry with Mr. *Day*, of *Calcethorpe Farm*. The pauper had, according to agreement, a house and garden, a rood of potatoe land, and the keep of a cow on his master's land. The cow was instead of so much money for wages. The pauper remained in Mr. *Day's* service eleven years, during which time, viz. in the year 1813, the pauper's cow failed in milk, on which account, through the kindness of his master, and not in consequence of any bargain, the pauper had in the place of the former cow, two heifers kept for him by his master, on his master's land, about eleven months. The potatoe land, and keep of the two heifers, were, together, of the value of 10*l.* per annum and upwards, but the potatoe land and keep of one cow, were below that value. On leaving Mr. *Day*, the pauper went to live as a confined laborer with Mr. *Briggs*, at *Scamblesby*, with whom he remained for five years. For the last three years of the pauper's service with Mr. *Briggs*, the pauper was relieved in *Scamblesby*, by the parish of *Donington-on-Bain*. At the expiration of the pauper's service with Mr. *Briggs*, the parish of *Donington-on-Bain* took him and his family to their parish, and put them into a cottage in the parish

A yearly hired servant in husbandry, had by agreement, a house and garden, a rood of potatoe ground, and the keep of a cow on his master's land. The keep of the cow was instead of so much wages. The cow, having failed in milk, the master in place thereof, kept two heifers for him on his land, through kindness, and not in consequence of any bargain. The potatoe land and the keep of the two heifers being, together, above the value of 10*l.*: Held, that this was renting a tenement so as to confer a settlement, after a sufficient residence.

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of *Benniworth*, an adjoining parish, where they continued to relieve them until some time in the year 1822. The pauper then became chargeable to the parish of *Benniworth*, and two Justices, by an order, removed him and his family to *Calcethorpe*. The question for the opinion of the Court is, whether the pauper gained a settlement in the latter parish.

*Scarlett* and *Empson*, in support of the order of Sessions. The cases in which it has been held that the right of a servant to feed cattle upon his master's land constitutes a tenement, within the meaning of the statute 13 & 14 Car. 2. c. 12. are very anomalous and extraordinary. Attempts are now making to extend this modern head of settlement, but they will not be received with favor by the Court. There is one rule which has never yet been broken through with respect to cases of this kind, namely, that where the feeding of the cattle is received by the servant as a portion of his wages, it does not constitute a tenement. Now the feeding of the two heifers in this case, clearly formed a part of the pauper's wages, and consequently cannot be held a tenement such as will confer a settlement. [*Bayley*, J. The case finds that there was no obligation on the master to provide the heifers for the benefit of the servant; there was no bargain to provide them—they were provided from motives of kindness (a); then can they be considered in the nature of wages?] It is not perhaps material to dwell upon that point, because the more comprehensive and important question is, whether the right to the profit of the cattle, whether acquired by favor or in the shape of wages, constituted the pauper the occupier of a tenement within the meaning of the statute. It seems impossible, consistently with the case of *Rex v. Cheshunt* (b), to say

(a) See *Rex v. Fillongley*, 1 T. R. 458. (b) 1 B. & A. 473.

that the pauper here was an occupier, or that he came to settle; for here, as in that case, the occupation was only as a servant, and the relation of landlord and tenant did not exist. So in the recent case of *Rex v. Bardwell* (a), which was almost the same in circumstances with the present, it was held that the pauper did not come to settle as a tenant, and therefore acquired no settlement; and for this reason, that he took the feeding of the sheep as a servant, and therefore could not be considered as renting a tenement within the meaning of the statute. The mere pernanacy of the profit of land by the mouths of the cattle is not sufficient; it must be enjoyed by means of an express contract; there must be a stipulation that the cattle shall be fed with the growing produce of the land, and the contract must be entire and to the full value of 10*l.* per annum. Now most, if not all of these circumstances are wanting in this case. The only two cases which bear against this argument are *Rex v. Fillongley* (b) and *Rex v. Lakenheath* (c); but the present is distinguishable from them both; from the former, inasmuch as here the *whole* tenement was dependent on the will of the master, and might have been withdrawn at any moment; and from the latter, because here there is no contract at all under which the pauper held, the case expressly negating the existence of any contract. In order to acquire a settlement by renting a tenement, the following requisites must be complied with: the pauper must come to settle as tenant of *all* the property; *Rex v. Bowness* (d) and *Rex v. Glastonbury* (e); he must stand in the relation of tenant of the premises during the *whole* time; *Rex v. South Lynn* (f); for if he is merely occupier of a tenement from which he is removeable at the pleasure

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(a) Ante, 53.

(b) 1 T. R. 458.

(c) Ante, vol. i. 433.

(d) 4 M. &amp; S. 210

(e) 1 B. &amp; A. 481.

(f) 5 T. R. 664.



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of his landlord, that will not confer a settlement; *Rex v. Londonthorpe* (a); the value of the land on which the cattle are fed must appear to be 10*l.* per annum, the profit of the cattle amounting to that sum not being sufficient, *Rex v. Minworth* (b); and the contract under which he holds must be express, or at least cannot be implied without some evidence to shew its existence; *Rex v. Croft* (c). Here the pauper did not come to settle as tenant, and therefore never stood in the relation of tenant; besides which, even if he had done so, he was removeable at any time at the will of his master; the value of the land is not proved to be 10*l.* per annum; and there is no evidence of the existence of any contract for taking the tenement, without which the holding is inefficacious, and which in this case cannot be implied. Upon all these grounds it is submitted that no settlement has been acquired, and consequently that the order of Sessions must be confirmed.

*Copley, A. G., Nolan, and Clinton, contra.* The feed of a cow, coupled with sufficient occupation, and the necessary amount of value, will confer a settlement, whether it is taken by the pauper expressly as tenant, or as a servant in lieu of wages; for if a man pays rent in labor, it is the same as money. Here the pauper, besides having a house to live in, had a rood of potatoe land, and two heifers, which were kept for him on his master's land. The potatoe land and the feed of the two heifers amounted together to the annual value of 10*l.* and therefore he rented a tenement within the meaning of the statute, and has acquired a settlement. The amount of rent actually paid by the occupier is quite immaterial, if the land he holds is of sufficient value.

(a) 6 T. R. 377.

(b) 2 East, 198.

(c) 3 B. & A. 171.

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[*Bayley, J.* Did this pauper come to settle upon a tenement of sufficient value? This case seems to me, in some of its circumstances, to be new, and distinguishable from all that have been cited.] He was tenant of property amounting altogether to 10*l.* per annum, and that is enough. *Rex v. Cheshunt (a)* does not apply, because that was decided upon the ground that the pauper occupied the house, not as tenant, but as servant. Whether rent is or is not in fact paid, is perfectly immaterial, if the value of the tenement be sufficient. *South Sydenham v. Lamerton (b)*. *Rex v. Fillongley (c)* is decisive to shew that occupation under a demise to a tenant to hold as long as the landlord pleases, and to be taken again by him when he pleases, is a sufficient taking of a tenement, and completely answers the objection on that point. That case has been recently recognised and confirmed in *Rex v. Croft (d)* and *Rex v. Lakenheath (e)*, and all those decisions must be overruled before the Court can hold that the permissive occupation in this case has vitiated the settlement. An express contract is not necessary, it may be inferred from the conduct and situation of the parties, and from the circumstances of the case. An actual enjoyment of any interest in land of the annual value of 10*l.* during the space of 40 days, is all that the statute requires, and that is found in this case. *Rex v. Bardwell (f)* was decided upon the ground that there was no agreement that the sheep should be pasture fed, and therefore does not govern the present case. In *Rex v. Bowness (g)*, the question was, not whether there was any contract, but what was the nature of the contract between the parties, and that was decided upon the

(a) 1 B. &amp; A. 473.

(e) Ante, vol. i. 433.

(b) 1 Sess. Ca. 122. 1 Str. 57. S. C.

(f) Ante, 53.

(c) 1 T. R. 458.

(g) 4 M. &amp; S. 210.

(d) 3 B. &amp; A. 171.

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ground that the contract was one of sale, and therefore that there was no occupation within the meaning of the statute; and the decision in *Rex v. Glastonbury* (a) turned precisely upon the same point. It has been said, that the pauper's occupation of the tenement was merely incidental to his service, and therefore conferred no settlement; but the fact is not so; this case falls completely within the description given by Lord *Ellenborough*, C.J. in *Rex v. Minster* (b), where he says, "Here it is stated that the pauper hired two cows, and that they were kept on the land of the master during the summer months; and it does not appear that this was connected with the service, or that it was necessary for the convenient performance of it that he should have the two cows." *Rex v. Kelstone* (c) and other cases might be cited to the same effect, and to prove that the occupation in this case was such as the law requires. Upon every principle, therefore, it seems clear that the pauper has acquired a settlement by renting a tenement in the parish of *Calcethorpe*.

The case was argued on a former day in this Term, when the Court took time to consider of its judgment, which was now delivered by


ABBOTT, C. J., who, after recapitulating the facts stated in the case, said, "The question before the Court in this case was, whether, under the circumstances thus stated, the pauper had gained a settlement in the parish in which he was hired, and wherein he had these two heifers, and the other advantages mentioned in the case. We are all strongly impressed with the inconvenience of conferring a settlement by a contract under circum-

(a) 1 B. & A. 481.

(b) 3 M. & S. 276.

(c) See *Rex v. Cherry Willingham*, ante, vol. i. 472.

stances like the present, and with that impression we thought it better to consider this subject before we delivered our judgment. We have done so; but we find the law so firmly established, that the perception of the profits of land by the mouths of cattle is a tenement within the meaning of 13 and 14 *Car.* 2. and that if such a tenement be of the value of 10*l.* it will confer a settlement on the occupier, whether the rent be paid in money or labor, that we do not think ourselves at liberty to infringe this doctrine; and consequently we are of opinion that a settlement was gained by this pauper in the parish of *Calcethorpe*; and therefore the rule must be made absolute for quashing the order of Sessions. The inconvenience, however, of this decision will only be retrospective, inasmuch as the law, so far as it regards this head of settlement, has been altered by the 59 *Geo.* 3. c. 50.; so that no person need now abstain from such acts of kindness towards laborers in husbandry as are mentioned in this case, through the fear of bringing a burthen on his parish.

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Rule absolute.

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BY an order of two Justices, *John Pearce, Elizabeth* his wife, and their two children, were directed to be re- Where, in the absence of the usual proof in support of a settlement by apprenticeship, it appeared that the pauper, when a boy, had lived for three years with his master, and then ran away; that twenty years since a fire had happened in the apartment in which the pauper's father lived, and destroyed every thing he had; that the father and mother of the pauper were both dead; that the pauper's master, and the wife of the latter, were also dead; that the master had left no property at his decease, and that no relatives of his were to be found; that a fellow-apprentice of the pauper had seen in his master's hand an indenture, which he understood to be the indenture of apprenticeship of the pauper; and that after the pauper had left his master's service he married, and the parish in which he was supposed to have served as an apprentice, relieved his wife by receiving her into the workhouse: Held, that this was sufficient evidence to warrant the Sessions in presuming a legal binding and service as an apprentice, so as to confer a settlement.

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moved from the parish of *St. Paul, in Norwich*, to the parish of *St. Mary-le-bone*, in the County of *Middlesex*; but *John Pearce* being then sick, the execution of the order was suspended, and he having soon afterwards died, the order was executed as to his widow and children, and they were accordingly conveyed to their destination. On appeal the Sessions confirmed the order, and stated the following case for the opinion of this Court:

The said *John Pearce*, deceased, the pauper, when a boy, lived with one *Benson*, a shoemaker, in *Riding-house-Lane*, in the parish of *St. Mary-le-bone*, in the County of *Middlesex*, three years, and then ran away from him. The respondents, in order to prove that the pauper so resided, as an apprentice legally bound, and at the same time to account for the non-production of indentures of apprenticeship, proved that a fire happened about twenty years ago in the apartment in which the pauper then resided, and burnt every thing he had; that the father and mother of the pauper were dead; that the said *Benson* and his wife are also dead; that the said *Benson* left no property at his decease; and that no relatives of his are to be found. As to the service with *Benson* by the pauper, it was stated by one *Thomas Nash* that he was apprentice to *Benson* at the same time with the pauper and another apprentice, and that he saw in his master's hand an indenture, which he understood to be the indenture of apprenticeship of the pauper; that the pauper, as well as the witness and the other apprentice, boarded and lodged in the master's house, in *St. Mary-le-bone*. Another witness stated, that he knew *Benson* at the time the pauper lived with him; that *Benson* had then two other apprentices, and called his apprentices lazy rascals. It further appeared that the pauper afterwards married, and that while living in the parish of *St. Mary-le-bone* his wife was admitted into the workhouse of the


said parish of *St. Mary-le-bone*, in a state of illness, and there died. If the Court should be of opinion that the above was sufficient evidence to prove a binding by indenture, and a service of the pauper as an apprentice, to *Benson*, in the appellant parish, then the orders of removal and of the Sessions to be confirmed; otherwise, to be discharged.

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H. Cooper, in support of the order of Sessions. The evidence was sufficient in every respect to establish a settlement by apprenticeship in *St. Mary-le-bone*. First, there was evidence enough of the existence and subsequent destruction of the indenture to let in the parol testimony; and second, the parol testimony, when admitted, was sufficient to shew that the husband of the pauper had been a party to the indenture, and had served, and gained a settlement, under it. The facts found in the case warrant these conclusions; for it is found that all the parties to the indenture are dead, and that they left behind them no relations, or property, from which any information upon the subject could be obtained. Search, therefore, was absolutely useless, for no hope could be entertained either that the indenture itself, or any will of *Benson*, the master, or any person who had acted either as his executor or administrator, would be discovered. It will be said that search should have been made at the Stamp-office, to ascertain whether any such indenture had been registered as having been stamped there. But, in the first place, evidence of that search, and of the result of it, would have been in the nature of hearsay evidence, and therefore open to objection; and secondly, even if admitted, it would not have gone the length of proving that any such indenture had really ever been executed. Such a search might, indeed, have been impracticable; for the commissioners might not have granted liberty to make it, and

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there is no law which compels them so to do. Such evidence would stand on a very different footing from that of the enrolment of a deed under the statute of Uses, which latter is of itself a record, and therefore free from all objection. Neither was such a search necessary, because in *Rex v. Long Buckby*(a), where an indenture, executed thirty years before, in the county of *Northampton*, was proved to have been delivered to the apprentice at the expiration of his time, and lost, and the parish in which he was settled by service under it, had relieved and otherwise treated him as a parishioner for the last twelve years previous to the appeal; the Court was of opinion, that the Sessions, under these circumstances, were right in presuming that the indenture had been regularly enrolled and stamped, although the other side proved, by the deputy-register and comptroller of the apprentice duties, that it did not appear that any such indenture had been stamped with the premium-stamp from 1773 to 1805. The presumption of law is to be favored, and against this negative evidence by the comptroller, may be set the possibility of an irregularity in the return made to the office(b). Then, secondly, the parol evidence, when admitted, was sufficient to justify the Sessions in the determination which they formed. How, or for what reason, could the witness, *Thomas Nash*, "understand what he saw to be an indenture of apprenticeship," unless it was so stated and represented to him at the time? In *Rex v. St. Michael's, Bath*(c), upon a question of settlement of the wife and children of a militiaman, it appeared by his examination, taken in writing under the Mutiny Act, that he went apprentice to *J. M.* and served five years and an half. The pauper, who was his wife, proved her marriage four years ago; that he ran away from her nine months afterwards; and that she had nei-

(a) 7 East, 45.

(b) 1 Nol. P. L. 544.

(c) 2 Bott. 459.

ther seen, heard from, nor known what was become of him, since. *J. M.*, the supposed master, being dead, this was held a reasonable presumption of a binding, although some circumstantial evidence was produced by the other side to shew that *J. M.* never had an apprentice; "for every thing is to be presumed in favor of a settlement."^(a) It is true that the authority of this case seems questioned in *Rex v. Clayton-le-Moors*^(b), but it has never been shaken in that part with reference to which it is now used, namely, the doctrine of presumption in favor of a settlement. On these grounds it is submitted that the Sessions have properly disposed of this case, and that their order ought to be affirmed.

Robinson, contra, contended that the parol testimony was inadmissible upon every rule and principle of the law of evidence. It was mere hearsay, and amounted to nothing like the positive testimony of facts. There was nothing proved which went to shew any intention on the part either of the supposed master or apprentice to execute an indenture, or to form any such relative connection, and none of the formalities requisite to the due execution of such an instrument were shewn to have been observed. All that was proved in fact amounted to this, that the witness, *Nash*, had on one occasion seen a paper which he understood to be an indenture. That was not evidence for any purpose, and ought not to have been admitted as such.

BAYLEY, J.—I am of opinion that the parol testimony admitted in this case was properly received, and that it was sufficient to found the presumption that an indenture was executed, and that the pauper's husband served, and acquired a settlement, under it. The general rule appli-


(a) 1 Nol. P. L. 542.

(b) 5 T. R. 704.

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cable to the doctrine of presumption is, that we are to presume that which reasonably accounts for the actual existing state of things, and I think the presumption drawn by the Sessions satisfies that rule. The facts in this case, unrefuted, appear to me conclusive. The pauper's husband lived with his master in the character of an apprentice, doing the same work, and receiving the same treatment, as his other apprentices did; and surely, after an interval of twenty years, it is not too much to presume that he really was an apprentice. With respect to proof of the destruction of the indenture, I think enough was given to let in the secondary evidence, and that the search at the Stamp-office was quite unnecessary. It must not be forgotten that the fact of the first wife of the pauper having been received into the workhouse of *St. Mary-le-bone* shews that that parish believed her husband to have been their parishioner, and that fact, coupled with the others I have alluded to, is, I think, decisive to shew that he had acquired a settlement as an apprentice in that parish.

HOLROYD, J. concurred (a).

Order of Sessions affirmed.

(a) *Abbott*, C. J. was sitting at Nisi Prius; and *Littledale*, J. was at the Old Bailey.



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TWO Justices, by their order, removed *Phæbe*, the wife of *John Jacobs*, and her five children, from the parish of *Walcot* to the parish of *Bathwick*, both in the county of *Somerset*. On appeal the Sessions quashed the order, subject to the opinion of this court on the following case :—

The pauper's husband, *John Jacobs*, took of *John Hill* a cottage, No. 1, *Argyle Place*, in the parish of *Bathwick*, and lived in it with his family from about the middle of *October*, 1819, until the 21st *December*, 1821. He paid the whole rent, amounting in all to 29*l.*, in the following manner :—On the 8th *January*, 1820, three pounds were paid for rent up to the 21st *December*, and the remainder by quarterly payments of 3*l.* 5*s.* each. The rent was generally received by *Charlotte* the wife of *John Hill*, and the receipts, duly stamp'd, hereinafter set out, were delivered by her to *John Jacobs* or his wife at the time the rent was received. *Charlotte Hill* could neither read nor write, nor did it appear by whom the several receipts were written. The former tenant of the cottage died shortly after *Michaelmas*, 1819, soon after which a conversation took place between *John Hill* and *John Jacobs* relating to the terms upon which the cottage was to be taken, which were afterwards, and before *Jacobs* took possession, reduced into writing in the following form :—

‘ I *John Hill* do hereby agree with Mr. *Jacobs* to let him that cottage or tenement, being No. 1, in *Argyle Place*, at per week, the sum of 5*s.*; the rent to commence on *Wednesday* next. *John Hill.* *John Jacobs.* *October*

Where a pauper hired a house under an unstamp'd written agreement: Held, that the Sessions might look at it to see whether it related to the premises in question, in order to determine upon the admissibility of parol evidence upon the same subject, with a view to raise the presumption of a contract which would confer a settlement. *Quære*, Whether any thing but an express contract for the hire of a house for a whole year will satisfy the requisites of the statute 59 G. 3. c. 50.

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6th, 1819." This paper was not stampd nor offered in evidence, but was produced by *Charlotte Hill*, in whose custody it had been kept, and was inspected by the court to see to what it referred. Neither *Charlotte Hill*, nor the pauper, knew of any fresh agreement after the cottage was first taken. *John Hill* died between the months of *April* and *July*, 1820. *John Jacobs* had, before the removal of the pauper and family, absconded and left them chargeable to the parish of *Walcot*, and the pauper had not seen him for a year before the time of hearing the appeal. Every other requisite to the validity of the removal and of the settlement in *Bathwick*, as well under the stat. 59 *Geo.* 3. c. 50. as otherwise, was established, except the bonâ fide hiring of the house for the term of one whole year; and whether the court of Quarter Sessions ought to have decided that this was established by the facts above stated, is the question for the opinion of the Court.

Schedule of the receipts referred to in the case:—

Received of Mr. *Jacobs* the sum of 3*l.* for rent due on the 21st day of *December* last past, by me *John Hill*.
January 8th, 1820.

Received of Mr. *Jacobs* the sum of 3*l.* 5*s.* for one quarter's rent due at *Lady day* last, by me *John Hill*.
April 17th, 1820.

Received of Mr. *Jacobs* the sum of 3*l.* 5*s.* for one quarter's rent due at *Midsummer* last. *Charlotte Hill*.
July 27th, 1820.

November 2d, 1820. Received of Mr. *Jacobs* the sum of 3*l.* 5*s.* for one quarter's rent due at *Michaelmas* last. *Charlotte Hill*.

December 21st, 1820. Received of Mr. *Jacobs* the sum of 3*l.* 5*s.* one quarter's rent due *St. Thomas' day* last. *Charlotte Hill*.

Received, 21st *July*, 1821, of Mr. *Jacobs*, 3*l.* 5*s.* for one quarter's rent due *Midsummer* last. *C. Hill.*

Received of *John Jacobs* the sum of 3*l.* 5*s.* for one quarter's rent due this day, 29th *September*, 1821, by *C. Hill.*


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Erskine in support of the order of Sessions. By the 59 *Geo.* 3. c. 50., in order to gain a settlement by renting a tenement, there must be a bonâ fide hiring of the premises for the term of one whole year. The case finds that every requisite of the statute was complied with, except the bonâ fide taking of the house for a whole year; and the question is whether the Sessions have properly drawn a conclusion against a yearly tenancy. In any view of the case it is clear that the Sessions have drawn the right conclusion. First, it being proved that the terms on which the pauper's husband originally took the tenement, were reduced into writing, it was not competent for the Sessions to go into presumptive evidence of the hiring, so as to constitute a tenancy within the meaning of the statute, because the court could not raise a presumption where the fact of an existing agreement was proved (a). Second, supposing the inadmissibility of the agreement for want of a stamp would let in presumptive evidence, still such evidence would not be sufficient, because since the statute, presumptive tenancies cannot be supported; an actual taking for a year is required, "any thing in any act or acts, or any construction of or implication from any act or acts, or any usage or custom to the contrary, in any wise notwithstanding:" and Third, admitting that evidence of a presumptive tenancy might be received, still the evidence in this case rebuts that presumption. The occupation commenced in the

(a) See 2 B. & A. 478.

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middle of a quarter, and therefore, in point of law, the tenancy would not commence until *Christmas*, 1819, and in fact ended at *Michaelmas* day, 1821. There was no proof of any notice to quit, and the language of all the receipts after the first, imports only a quarterly taking, because they all speak of rent "due" at a particular quarter. In the case of a tenancy from year to year, there must be half a year's notice to quit at the end of a year, *Right v. Derby* (a), and on a quarterly letting, to quit at a quarter's notice, the quarter must end with a year of the tenancy, *Doe v. Donovan* (b). Here the commencement of the occupation is in the fraction of a quarter, and the first payment is for less than a quarter, and consequently repels the presumption of an agreement for a tenancy from *Michaelmas*, 1819. Where a tenant entered in the middle of a quarter, and afterwards paid from that time to the beginning of a succeeding regular quarter, Lord *Ellenborough*, C.J. held that the tenancy commenced from the quarter succeeding his entering. *Doe v. Johnson* (c). Here there was no proof of notice to quit, nor of a quitting at the end of the year, and therefore every circumstance in the case rebuts the presumption of a yearly taking and renting. *Rex v. Pendleton* (d) is an authority for shewing that the Sessions might look at the unstamped agreement set out in this case, in order to guide them in receiving other evidence as to the nature of the contract between the parties, although it could not be received as evidence of the agreement itself. The agreement, could it have been received, would have put the question completely out of doubt, because it would shew a letting by the week; but independently of any consideration of the agreement, the circumstances of the case justify the conclusion drawn by the Sessions. It was their peculiar province to draw

(a) 1 T. R. 159.
 (b) 1 Taunt. 555.

(c) 6 Esp. 10.
 (d) 15 East, 449.

he conclusion from the facts (a), and having drawn the right conclusion, the order must be affirmed.

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Jeremy, on the same side, was stopt by the Court. [*Abbott*, C. J. Can we raise an implication of hiring for a year, by the payment of rent, when we are in a state of absolute uncertainty as to what the agreement is? If we read the written contract, it is a weekly hiring; but if we are not at liberty to read it, can we say that it is any thing but a presumptive hiring; and then, is it a hiring in compliance with the statute? We will hear the other side.]

C. F. Williams and *Moody*, contra. The insertion of the unstamped agreement into the case, after the Sessions had decided that it was inadmissible in evidence, is rather an anomalous proceeding, and cannot fail to have an influence in the decision of this question, which ought to be considered as if no such agreement had ever existed. [*Abbott*, C. J. The Court has a right to know that such a paper was produced, although inadmissible in evidence for want of a stamp. *Bayley*, J. When a case is before a judge and jury at *Nisi Prius*, the judge has a right to look at a paper produced, though not admissible in evidence, in order that he may see how far parol evidence afterwards offered, may be received or rejected. The Justices at Sessions fill the double character of judges and jurors, and, in their character of judges, they have a right to look at a paper of this description, and remit it to us in their double character. In our character of judges only, have we not a right to see the paper also?] Admitting that the Court has a right to see the paper, still, as it cannot be acted upon as legal evidence, it must

(a) *Rex v. Maidstone*, 12 East, 550. and see the observations of *Le Blanc*, J. in that case.

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be taken to be an instrument, the contents of which are unknown, and consequently it is left open to the Court to determine, as matter of presumption arising from other evidence, what the relation between the parties was in point of law(a). [*Bayley, J.* Are you at liberty to raise a presumption of fact dehors the written evidence?] If there are circumstances in the case which raise a presumption, independently of the original agreement, the Court will give effect to them without regard to any other evidence. Now, assuming that the written agreement imports a weekly hiring, still if the receipts which are set out in the case are totally repugnant to a hiring of that description, the Court will not presume that the hiring was weekly, but, on the contrary, will rather conclude that it was yearly. It may be true, that when the tenancy originally commenced it was weekly, but non constat that it continued so. The Court must be satisfied by the clearest evidence, that the holding during the time in dispute was weekly, for otherwise the presumption of law arising from the evidence, is that the hiring was yearly. It does not follow because there had been a written agreement for a weekly tenancy, during a certain period, that it continued in force during all the time the pauper's husband was in the occupation of the house. The facts of the case raise a strong presumption that the original agreement was in operation for a definite period, at the end of which, a new agreement was entered into. The receipts shew that there was a yearly tenancy commencing on the 21st *December*, 1819, after which time there were quarterly receipts, respectively stating the rent to be due at the regular quarter days. The first receipt is for the fractional time during which the pauper's husband occupied, namely, until the 21st *December*; after which, the

(a) See *Rex v. Castleton*, 6 T. R. 236. and *Rippener v. Wright*, 2 B. & A. 478.

payments are regular multiples of a year, until the tenancy ends at the *Michaelmas* quarter in 1821. In *Richardson v. Langridge* (a), *Chambre, J.* says, "if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the Courts have said, that is evidence of a taking for a year. The Courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it." Here all the admissible evidence shews a yearly tenancy, and therefore the Sessions ought to have found the fact of a *bonâ fide* taking for a year, so as to confer a settlement. As the Justices have not merely stated a conclusion from the evidence before them, but have also stated the premises from which that conclusion is drawn, this Court is not precluded from examining the propriety of their determination; *Rex v. Tedford* (b), *Rex v. Whittlebury* (c), in which latter case Lord Kenyon, C.J. said, "the case of *Rex v. Tedford* is a very considerable authority to shew, that where the Sessions state all the facts, as well as their determination, we are not precluded from examining the conclusion drawn by them from the facts." Upon these authorities it is clear, first, that the Court will feel themselves at liberty to give an opinion upon this case; and second, that that opinion must be, that the Sessions have been mistaken in point of law, and consequently that their order, quashing the order of removal, must itself be quashed. They cited *Doe v. Morris* (d), and *Rex v. Castleton* (e).

ABBOTT, C. J.—This case arises on the statute 59 Geo. 3. c. 50. by which it is enacted, that no settlement shall be gained by the renting of any tenement, unless

(a) 4 Taunt. 132.

(b) Burr. S. C. 57.

(c) 6 T. R. 464. vide *Rex v. Brightelmstone*, ante, vol. i. 74.
Rex v. North Collingham, ante, vol. i. 393.

(d) 12 East, 237.

(e) Burr. S. C. 569.

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there be a bonâ fide hiring for the sum of £10 a year, at the least, for the term of one whole year. The question is, whether we can now tell the Court of Quarter Sessions, who have decided that there was no such hiring, that they ought to have decided that there was, upon the facts which they have set forth as having been proved in evidence. I am not able to say that they ought so to have decided. I do not however go the length of saying, that if they had so decided, I should have felt myself at liberty to reverse their decision, but I cannot say that they ought so to have decided. Then what are the facts? It appeared that the original hiring of the cottage was under a written contract. The contents of the contract being unknown, are we to say that it did not embrace the whole period of the occupation of the tenement? There is certainly no direct evidence that it did not; and without direct evidence to the contrary, it is rather to be presumed that the contract under which the occupation commenced, continued to the end of the tenancy. What can we suppose the contract to be, without regard to the agreement? Consistently with the evidence it may have been a contract for a weekly tenancy. Although the sums paid are not exact multiples, at so much per week, yet they come so near, that the parties might agree so to treat them. But I cannot say, upon this evidence, that the contract was not this; that the pauper's husband should pay 3*l.* for the broken period up to the 21st *December*, (*St. Thomas's Day*, and which I take to be one of the usual quarter days in that part of the country,) and so account for his rent every quarter-day afterwards by paying 3*l.* 5*s.* Not being able to say that such was not the contract, (and if it was, certainly no settlement would be gained,) I cannot say that the Sessions ought to have decided otherwise than they have done.

BAYLEY, J.—The burthen of proof lay in this case

upon the removing parish. It was for them to make out to the satisfaction of the Justices, that there was a yearly hiring. If the Sessions were in doubt, they have done right in quashing the order of removal; and we are not at liberty to say they have done wrong, unless we can take upon ourselves to decide, that they were bound to hold that there was a yearly hiring. In the first place the Sessions were at liberty to look at the written contract or not, according to circumstances. They were not at liberty to act upon it as evidence if it was not admissible, but if it related to the premises in question, they might look at it if they thought proper. It appears from the evidence in the case that there was a written contract applicable to a tenancy between the parties which was not admissible for want of a stamp. As soon as the fact is established that there is a written contract, or so long as it remains even in dubio whether such a contract exists, all parol evidence must be entirely excluded. That has been decided over and over again. It was so decided in *Rippener v. Wright* (a); and I remember, in the case of an action for use and occupation tried before Lord Eldon in C. P. when it appeared, on cross-examination, that there was a written agreement between the parties, which was not produced, his Lordship directed a nonsuit. But if we look at the written contract, which we are at liberty to do, with a view of interpreting the effect of the rest of the evidence, then we see that it is a hiring at five shillings per week, evidently shewing a weekly hiring. What is the effect of the receipts given in evidence? It is perfectly consistent with them that the hiring might have been weekly, but that the rent was to be paid quarterly. The first receipt certainly shews a variation from the terms contained in the written agreement, because according to that there was only a period

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of eleven weeks from the time it bears date until the 21st *December*, which would make 55s. as the sum due, though the sum paid was in fact 60s. There might have been some reason or other for this deviation from the terms of the written contract, which we cannot discover, and with respect to which we are at least left in doubt. The parties might have some particular object in view in making that arrangement as to the broken quarter; but however that may be, I am by no means prepared to say that the Sessions have done wrong in coming to the conclusion which they have formed.

HOLROYD, J.—I am of the same opinion. I think that no evidence was admissible at the Sessions which would have the effect of contravening the terms of the agreement. The Sessions were at liberty certainly to look at the agreement, but only for the purpose of seeing whether it related to the premises in question. The agreement being inadmissible as evidence, we are not supposed to know its terms, nor would parol evidence of its contents be admissible. Undoubtedly it might have been shewn from subsequent acts that the agreement had been put an end to; but there is no evidence to that effect in this case. There is nothing in the receipts to shew any variation from the original agreement. Without the agreement, it is impossible for us to say whether it was a weekly, quarterly, or yearly tenancy, and therefore we cannot say that the Sessions have done wrong in holding that this was not a *bonâ fide* hiring for a year within the terms of the statute.

LITLEDALE, J. concurred.

Order of Sessions confirmed.



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The KING v. The AIRE and CALDER NAVIGATION.

UPON the hearing of an appeal at the Sessions for the West Riding of the county of *York*, of the undertakers of the *Aire* and *Calder* Navigation, against a rate or assessment made for the relief of the poor of the township of *Castleford* in the said Riding, bearing date the 11th *March* last, it was ordered that the said rate or assessment be confirmed, subject to the opinion of this Court, as to the following point. On the rate in question being produced, it appeared that, as far as it related to the appellants, it was as follows:

A poor rate, without giving a specification of the property for which the party is rated, is bad; therefore, where under the head "occupiers," the names only of the parties rated were given, with the rates and assessments opposite their names respectively: Held, insufficient.

Rate.

Rate.

Assessment.

"The undertakers of the *Aire* and *Calder* Navigation, as occupiers of so much of the land which constitutes the bed of the river *Aire*, covered with water, as lies in the township of *Castleford* in the West Riding of the county of *York*; and also as occupiers of so much of the ground as is used for a towing path for the said river, and is within the said township."

£.	s.	d.	£.	s.	d.
156	5	0		15	12 6.

But with respect to all the other individuals charged thereby, it altogether omitted to state the property in respect of which they were rated. The first of these assessments was as follows:

Occupier.

Rate.

Assessment.

Ashton, Joseph	-	£ 1	8	9	-	-	0	2	10
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And all the other assessments were exactly in a similar form. The appellant's counsel, upon this, objected that the rate ought to be quashed, inasmuch as this mode of assessment was insufficient, it not appearing by the rate in respect of what property the other individuals rated were assessed, and that the appellants were thereby prevented from instituting any comparison as to the relative value of that property by their own. This objection was specifically pointed out by the notice of appeal. The Sessions, however, overruled this preliminary objection, subject to the opinion of this Court (a).

Blackburne and Bland, in support of the order of Sessions. The objection to the form of this rate is untenable. [*Abbott*, C. J. Must not the rate specify the description of property in respect of which the occupier is rated; house or land, or something by which it may be ascertained whether he is properly rated?] The word "occupier" signifies, *ex vi termini*, real property. The rate shews that it must be real property for which the party is assessed, or it amounts at least to a sufficient general description of the property in respect of which the party is rated. A book is kept by the overseer of the poor, which is open to the inspection of every inhabitant, so as to enable him to ascertain for what his neighbours are rated, if any further information be desired. But sufficient appears here to enable every person who is dissatisfied with the rate to appeal to the Sessions for any objection thereto. The statute 43 *Eliz.* c. 2. directs no particular form in which the occupier shall be rated. All that it directs is that the overseers

(a) There was another point reserved by the Sessions as to the rateability of the *Aire and Calder* navigation; but as the decision of the Court was founded upon the form of the rate, it is unnecessary to set out that part of the case.

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shall raise, weekly or otherwise, by taxation of every inhabitant, &c. and every occupier of lands, houses, &c. convenient stock of flax, hemp, &c. to set the poor on work." In *Rex v. Brightman* (a) the word "occupier" is held to imply real property; and therefore it should mean, according to that decision, that the word "occupier" imports not only a sufficient description of the person rated, but the property in respect of which he is rated. In this particular township no difficulty whatever can arise, because the rate is made half yearly, and is subject to the investigation of the justices before it is allowed, and therefore the inhabitants have every means of knowing and judging whether the rate is properly estimated. [Abbott, C. J. The case does not state that the rate book is kept half yearly, or that it discloses every change of property which takes place in the township.—Gyley, J. For any thing that appears, this rate may be made upon a valuation of property taken twenty years ago.—Abbott, C. J. It is consistent with the statement in this case that the overseers of the township may be perpetual, and a perpetual overseer is not bound to shew parish books. Every man has a right to know in what respect his neighbour is rated, for the purpose of ascertaining whether he himself is properly rated.] They have a copy of the rate at a given price. [Abbott, J. Still a rate in this form would give him no information. In this rate *Joseph Ashton* is rated at so much as an occupier. Suppose he is under rated, what means have his neighbours of knowing whether he is rated for a dwelling house only, or for a dwelling house and field together? He may be rated for saleable underwood, for any thing we know. It is said that a book is not, but unless the case shews the existence of such

(a) 8 Mod. 38. 3 Burr. 1062.

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a book, there is no authority to compel the inspection of it.] This form of rate prevails almost throughout the whole county of *York*, and has received the sanction of the magistrates, who are the most competent judges upon such subjects. If this Court should be of opinion that this is an improper form of rate, it will open a wide door to litigation and produce an innumerable number of appeals at the Sessions; for if there should be by any accident a misdescription of the property rated, it may be open to objection, and afford a ground of appeal. No act of parliament has provided in what form the rate shall be made, and therefore it must be left to the discretion of the justices. The last statute upon this subject only mentions the sum of money for which the party is to be rated, but makes no allusion to the form in which the rate is to be made. This is a mere technical objection, and ought not to prevail... [*Bayley, J.* I do not think it is a technical objection. The form in which this rate is made may mislead parties, and induce them to appeal, which they would not do if they knew the truth of the case, and were fully informed of the description of property rated. This rate gives no information to any body. I see *Joseph Ashton* rated at 1*l.* 8*s.* 9*d.* and assessed at 2*s.* 10*d.* This gives no information; it may be for a cottage and a close of land which he occupied last year; but until the appellant goes to the Sessions he cannot ascertain what the fact really is. If that information was given in the first instance he probably would not trouble himself with an appeal.] This rate is copied from the form given in *Burn's Justice*, and has been filled up according to the directions there given. [*Abbott, C. J.* I have not the latest edition of *Burn's Justice*, but in the edition published by Mr. *Chetwynd* in 1820(a), it is said that the form of the rate may be to

(a) Vol. iv. p. 98.

the following effect ; and then there are columns headed in this manner, " Names of Occupiers," " Description of the Premises they hold," " Annual value," and " Sum assessed six-pence the pound." ]

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*Scarlett, Tindal, and E. Alderson*, contra, were not heard.

ABBOTT, C. J.—I am of opinion, for the reasons already intimated, that the form of this rate is insufficient, and cannot be supported. I am sorry to hear that the practice of rating in this form prevails so generally in the county of *York*, because it is pregnant with a great deal of inconvenience, and must lead to great litigation. I have always conceived that every rate pointed out and specified the description of property rated, as it certainly ought to do. The order of Sessions must be quashed.

BAYLEY, J.—Many questions may arise from the manner in which the thing is specified, which is the subject of rate. For instance, in the case of tolls, the practice always has been to specify what description of tolls they are ; as tolls of a lighthouse, and so forth. There can be no difficulty in specifying the nature of the property, and setting down the name of the occupier, and where he can be found. Nobody knows from this rate even where *Joseph Ashton* lives.

HOLROYD, J.—The statute of *Elizabeth* does not impose a rate upon the occupiers of every description of real property, but only on particular descriptions, as " lands, houses, tithes impropriate, appropriations of tithes, coal mines, or saleable underwoods." Now this rate only describes *Joseph Ashton* as an occupier. He may be the occupier of some species of real property which



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is not the subject of a poor rate. There are some species of mines which are not rateable, and he may be rated for property of that description. The objection is that he does not appear to be the occupier of any thing rateable under the statute of *Elizabeth*.

Order of Sessions quashed. (a)

(a) *Littledale*, J. was in the Bail Court.

END OF EASTER TERM.

# CASES

IN THE

## COURT OF KING'S BENCH.

FOR THE USE OF

### Justices of the Peace.

TRINITY TERM, 1824.

The KING v. The INHABITANTS of KNAPTOTT.

TWO Justices, by their order, removed *Elizabeth Burdett*, single woman, from the parish of *Gumley* to the parish of *Knaptott*, both in the county of *Leicester*. Upon the trial of an appeal from this order the respondents, in support of the order, proved that the father of the pauper while residing in the respondents' parish, had received relief from the appellant parish for five years prior to 1815. The appellants then offered in evidence an order of the court of Quarter Sessions upon an appeal, in 1815, between the same parishes respecting the settlement of a brother of the pauper, by which an order, adjudging the brother to be settled in the appellant parish, was quashed. This was objected to by the Counsel for the respondents, and rejected by the Court. Another order was then produced, whereby the pauper, *Elizabeth Burdett*, was removed from *Gumley* to *Mowsley* in 1822, which was afterwards quashed by consent. The appellants then called the chairman of the court in

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Monday,  
June 21.

An order of Sessions upon an appeal between two parishes respecting the settlement of pauper A. is not admissible upon the trial of an appeal touching the settlement of pauper B. his sister, on a suggestion that the point at issue was precisely the same in both appeals.


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1815, who proved that his notes of the trial were destroyed, and that he did not remember the evidence. They then called the father of the pauper, and asked him whether he was a witness at the trial in 1815. To this he answered in the affirmative. He was then asked to what facts he was then examined. This was objected to by the counsel for the respondents. The Court thought that the question was not relevant, and not admissible; and they confirmed the order of removal, subject to the opinion of this court on the evidence so tendered by the appellants.

*S. M. Phillips*, and *Humfrey*, in support of the order of Sessions. The judgment of the Sessions in the former appeal was not admissible in evidence on the hearing of the present appeal, and therefore the Justices have done right in rejecting it. The rule upon this subject was ably laid down by *De Grey*, C. J. in his celebrated judgment in the *Duchess of Kingston's* case (*a*), and has been invariably adopted and acted upon by all subsequent judges. He says, "From the variety of cases relative to judgments being given in evidence in civil suits, it seems to follow as generally true, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court:" and the same principle and the same rule appear, with still greater force, to apply to judgments in the same Court (*b*). The evidence rejected in this case does not come within the scope of that rule, for it was not "directly upon the point," nor "between the same parties," nor "upon the matter directly in question." The same point was not


(*a*) 20 Ho. St. Tr. 538.      (*b*) Vide *Phil. Ev.* 242, 3d ed.

in issue in the two appeals, for the former was to try the question of where the brother of the pauper was settled, and the latter was to try where the pauper herself was settled. If it had been received it would have been wholly irrelevant and ineffective, for it could have proved nothing bearing upon this case, although it might, and probably would, have been conclusive, if the parties to this appeal had been the same as were concerned in the former. To hold such evidence admissible under such circumstances, would be productive of great inconvenience and injustice, for it would be, in effect, compelling one parish to try the question of their own rights and liabilities according to the judgment, or the ability, or the whim of another.

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*Clarke and G. Marriott, contra.* What would have been the effect of the evidence, if admitted, is not now the question. The parties to the two appeals are virtually the same, and the question at issue would also have appeared to be the same, if the evidence had been received. [*Bayley, J.* The question of the admissibility of the judgment may stand upon a very different footing, according as the effect of it was to quash or confirm the order of removal. Where the order is quashed, the removing parish may have failed from want of evidence, and may be better furnished upon another appeal.] The object proposed in tendering the judgment in evidence was to shew, that the point then in issue was precisely the same as that in issue in the former appeal; that the appeal had in fact been once already tried and disposed of, and that the appellants had acted against good faith in seeking to try it again. Then, secondly, the question put to the pauper's father, and not allowed by the Sessions to be answered, was a perfectly legal question, and was also calculated to shew the identity of the two

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issues, and therefore ought to have been allowed.  
*Strutt v. Boringdon* (a) and *Vooght v. Winch* (b).

The Court took two days time to consider the case, and judgment was now delivered by

BAYLEY, J. (c)—Two questions were raised for our consideration in this case. First, whether the prior order of removal, and the judgment of the Court of Quarter Sessions quashing the same, were admissible in evidence in the present appeal; and second, whether the question put to the pauper's father and interdicted by the Court, ought to have been allowed and answered. The order of removal and the judgment thereon, were tendered for the purpose of disproving the pauper's settlement in the respondent parish: the question put to the pauper's father, he having stated that he was examined at the former appeal, was, what facts he had there stated. We, who heard this case argued, are decidedly of opinion that the prior order of removal and judgment were not, with any explanation, receivable in evidence on the second appeal. The prior order of removal was quashed. That may have been done upon any one of three grounds. Either, because the Sessions were of opinion that the pauper was emancipated and had acquired a settlement of his own; or, because the respondents were not then in a situation to prove the father's settlement in the appellant parish; or, because the appellants were able to prove a settlement of his elsewhere. The case does not inform us on which of these grounds the order was quashed, but it is conceded that it was

(a) 5 Esp. N. P. C. 56.

(b) 2 B. & A. 662. See 3 Wils. 304, 2 Sir W. Bl. 830, 3 Burr. 1855, and 8 T. R. 620.

(c) *Littledale*, J. was absent.

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quashed upon the merits, and not upon any point of form. If we believed that the ground of the judgment was the want of proof of the father's settlement in the appellant parish, and had then thought that the evidence was, under those circumstances, admissible, we should have sent the case back to the Sessions for further explanation on that head; but we are of opinion, that under none of the circumstances supposed, the evidence was admissible, and therefore we think it better to dispose of the case in its present shape. As a broad and general proposition, we may say, that the order of removal, confirmed, or reversed upon appeal, or acquiesced in without appeal, is receivable in evidence, because it is a judgment of law. But where, and under what circumstances, is it receivable? This inquiry is answered by the rule laid down by *De Grey*, C. J. in the *Duchess of Kingston's* case, by which we find that, to make the order receivable, the parties in the case must be the same, and the point in issue must be the same: these are both indispensable qualifications. If the matter in issue be collateral or incidental, the evidence cannot be received. The language of that learned judge, as applicable to the present case, is, "that a judgment directly upon the point, is, as evidence, conclusive between the same parties, upon the matter directly in question." Does this case fall within that rule? Is the matter in question in the second appeal the same as that in the former? Is the judgment offered in evidence in the second directly upon the point which was in issue in the former? We think not. From the very nature and substance of the order of removal, it is merely collateral to the issue raised in the second appeal. By the original order an individual, not the pauper in this case, was removed; the question to be tried on appeal was, where his settlement was; the judgment decided that his settlement was in a

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particular parish. That was the point there, and that was the matter in question ; but it is not so here. The early case of *Harrow v. Ryslip* (a) will illustrate this position. The case was this.—“*A.* comes into *Harrow*, and being likely to become chargeable, was removed to *Ryslip*; *Ryslip* appealed, and upon the appeal *A.* was adjudged to be settled at *Ryslip*; afterwards *Ryslip* discovered that *Hendon* was the place of his last legal settlement, and sent him thither; and the question was, whether, after the adjudication upon the appeal, *Ryslip* was not estopped against all the world, to say, that *Ryslip* was not the place of his last legal settlement: et per *Holt*, C.J., “*Ryslip* is estopped to say otherwise: for if *Ryslip* had not been the very place of his last legal settlement, the Justices must have sent him back to *Harrow*, who were first possessed of him, for that reason, because they were possessed of him, and he did not belong to *Ryslip*. And now this is in effect the same question again, viz.—whether he belongs to *Ryslip*? which question has been already determined by the Justices on the appeal, who have adjudged that he was last settled at *Ryslip*.” The report goes on to say,—“Afterwards this was moved again, and then *Holt* and *Gould* held the adjudication was final as to *Ryslip* against all persons and places, because the point of his settlement as to *Ryslip* was tried in the appeal; but as to *Harrow* (for he had been formerly removed by them to *Hendon*, and that order reversed) they were at liberty to send him to any other place, and were not estopped; because the Justices on the appeal did not adjudge him to be settled at *Harrow*, though they adjudged him now to be settled at *Ryslip*; so that the other point was not tried.” The language of the Court in one part of this case ap-

(a) Salk. 524. Vide *Mynton v. Stony-Stratford*, id. 527.

plies to the instance where the order of removal is confirmed, and that on the other where it is reversed, and points out the distinction already alluded to between a judgment of confirmation and one of reversal. In the latter instance the Sessions do not find where the pauper is settled, and thus, the order of removal, confirmed, or unappealed from, is conclusive evidence that the settlement is in the place to which he is removed; reversed, it is conclusive evidence that the settlement is not there; and beyond this point, no case with which we are acquainted has ever yet gone. There are, undoubtedly, cases which shew that where the point in issue is decided, all results flowing out of that point are decided also; as, for instance, that a wife's removal to the place of her husband's settlement, is conclusive to shew that that is his place of settlement. But no case has ever gone further than to hold that the point decided is conclusive upon the same point, and therefore receivable in evidence; other points, collateral or incidental to the point decided, and undetermined by it, are excluded from its operation, and cannot be proved by giving the point decided in evidence. It is the same with respect to judgments; they are merely evidence of the point decided. It is admitted that the pauper has no settlement in the parish to which he has been removed, unless his father has acquired a settlement there. Then the father's settlement was a question which came in incidentally, but incidentally only, and was not the point decided by the judgment in the first appeal, which consequently was not admissible as evidence in the second. For these reasons, we are of opinion that the order of Sessions in this case was right, that the Sessions properly rejected the evidence tendered, and that the rule for quashing their order must be discharged.

Order of Sessions confirmed.

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The KING v. R. S. COOKE.

The Court will not allow a defective plea in abatement to an indictment for a misdemeanour, when once pleaded, to be amended.

Plea of peerage by way of abatement to an indictment for a misdemeanour:—Held, ill on demurrer for not shewing in what manner defendant derived his title and that he was a peer of the United Kingdom.

**INDICTMENT** against *Cooke* and others for a conspiracy, to which the defendant *Cooke* pleaded in abatement as follows;—“ And *Richard Stafford Cooke*, Lord *Stafford*, Baron *Stafford*, who is indicted by the name of *Richard Stafford Cooke*, late of the parish of *Castlechurch*, in the county of *Stafford*, gentleman, in his own person comes, and having heard the said indictment read, prays judgment of the said indictment, because he says, that on the day of taking the inquisition aforesaid, and long before, he was, and from thence hitherto hath been, and still is, Lord *Stafford*, Baron *Stafford*, and the state, degree, title and honour of Lord *Stafford*, Baron *Stafford*, on the day of taking the inquisition aforesaid, and long before, had and enjoyed, and still has and enjoys; and this he the said *Richard Stafford Cooke*, Lord *Stafford*, Baron *Stafford*, is ready to verify. Wherefore, &c. Demurrer to the plea, and joinder in demurrer.

The COURT having refused to quash the plea upon motion (a), and the prosecutor having subsequently demurred to it,

*Campbell*, in *Easter Term* last, moved for leave to amend the plea, sed,

**PER CURIAM.**—This is a dilatory plea; a mere plea of misnomer; standing upon the same footing as the common pleas in abatement in civil cases, which are never allowed to be amended. It goes merely to the description of the defendant, and entirely avoids the

(a) Vide ante, 174.

merits of the case. The indictment must be tried in the same form, whether the plea is true or false. If we were to allow the defendant to amend, we should in effect be trying the question of the peerage. No instance can be found in which such a permission has been granted, and the Court will not depart from the rule laid down in civil cases, not to allow a plea in abatement to be amended, and thereby set up a precedent, which would be highly dangerous in its consequences.

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Rule refused.

The demurrer was now argued by,

*Talfourd*, on the part of the prosecution. There are two objections to this plea, and both are fatal. First, it does not shew upon the face of it that the defendant claims to be a peer of *England* or of the United Kingdom; and second, it does not set out the mode in which he derives his claim. First, no one can claim to be a peer of the realm without first shewing that he is a lord of parliament: Lord *Sanchar's* case (*a*); and 2 Inst. 667, where it is said by Lord *Coke*, "all dukes, marquesses, earls, viscounts, and barons of other nations, or which are not lords of the parliament of *England*, are named armigeri, if they be no knights, and if knights, then they are named milites." The plea claims the title of "Baron *Stafford*," not Baron of *Stafford*, and therefore does not shew that the title is taken from any place within the United Kingdom, for the title of Baron *Stafford* may exist in some other country; and although it may not be necessary to shew a derivation of the title from *England*, still it is necessary to shew, what is certainly not shewn

(a) 9 Rep. 117.

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by this plea, a right to enjoy the title *in England*. A plea, similar to this, has indeed been held sufficient, without averring that the defendant was *Unus Parium Regni Angliæ*; *Rex v. Knollys* (a): but the ground of that decision was that the plea set out the letters-patent by which the peerage then in question was created. It will, perhaps, be said that as there is in the statute book an act of parliament (b), entitled "An act for the restitution in blood of the Lord *Stafford*," the Court must take judicial notice that "Lord *Stafford*, Baron *Stafford*," is an *English* title; and that so the plea may be supported. But in the first place that was only a private and personal act, therefore the Court cannot take judicial notice of it; and in the second, as the plea does not shew that the title now claimed is the same as that mentioned in the act, the Court cannot intend their identity. The distinctions between a public and a private act are enumerated in *Buller's Nisi Prius* (c), and this act does not possess any one of the characteristics there attributed to public acts. But if the act could be noticed, still it does not respect the same title which the defendant claims, for the act restored the party to the title of Lord *Stafford*, and authorised him to bear the arms of the Barons of *Stafford*, whereas the defendant claims to be Baron *Stafford*. Secondly, the plea is bad for not shewing how and by what mode the defendant derives his title. There are four modes of doing this; by writ, by letters-patent, by descent, and by prescription. The first of these would be triable by record, the second by production of the letters-patent, and the third and fourth by the country; *Rex v. Knollys*, and the authorities there cited: and therefore unless the mode by which the title is derived appears upon the plea, it is bad for uncertainty, for the

(a) 1 Ld. Ray. 10.

(b) 1 Ed. 6.

(c) 223.

prosecutor cannot possibly ascertain in what form he is to take issue upon it. It is only further to be observed that this is merely a dilatory plea, and therefore will not be viewed with favor by the Court, as it tends to a delay of public justice.

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*Campbell*, contra. The Court will, if they can, give a reasonable intendment to the plea, and so construed, there is enough stated upon the face of it to lead them to the presumption that the defendant is and claims to be a peer of *England* and of parliament. [*Bayley*, J. May he not be Baron *Stafford* of *Ireland*, or of any other country?] The statute 1 *Ed.* 6. proves the title to be *English*, and the Court will not go out of their way to infer that it is foreign. Without the statute it would perhaps be difficult to support the plea, but thus aided the plea is clearly good. If the 1 *Ed.* 6. is a public act, the Court will look at it the same as if it had been set out in the plea. Now it is a public act. All acts which respect the government and measures of state, are public acts: that is the true criterion. This act touches the king's prerogative; it affects one branch of the legislature, and consequently all the peers of the realm; and as such it is a public act, and must be judicially noticed by the Court. Then, what is the operation of the act? It restores Lord *Stafford* in blood; it declares that he shall have in parliament and in other places, the room, name, place, and voice of a baron, and it empowers him to take and bear the arms of the Barons of *Stafford*. In judicial proceedings of whatever kind, if a person is described as a peer by a title of peerage in *England*, he must be considered as described and as being a peer of *England*. Such is the description in this act; the barony of *Stafford* is described as a peerage in *England*, and therefore the person so alluded to must be taken to be a peer of *England*. Neither does

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the plea présent any difficulty to the prosecutor in taking issue upon it, for the act shews the origin of the peerage, which can have come to the defendant only by descent; and therefore it was not necessary to aver a claim by descent, and the plea is good without such averment.

*Talfourd*, in reply, was stopt by the Court.

BAYLEY, J.—The defendant insists that he is not properly described in the indictment, but if the indictment had described him as a peer, he would not thereby have been entitled to claim any privilege of peerage. The plea therefore is a dilatory plea, an ordinary plea in abatement, and falls within the rule which says that pleas in abatement to writs or indictments must give a better writ or count, and must be certain in every particular: consequently the defendant was bound to shew, not only that he had the right to a peerage, but also the mode by which he derived that right. There are many good reasons for this rule, as applicable to the present case. In the first place, the prosecutor has a right to take issue upon the fact of peerage, and the mode of trial depends upon and varies with the nature of the claim. If the defendant claims to be a peer by writ, he is no peer until he has taken his seat as such, and that fact must be tried by the record of parliament. If he claims by patent, the patent must be produced, and then, and not till then, his title is complete. In such a case the replication would be non concessit, and that issue would be triable by the patent itself. If he claims by descent, or by prescription, that must be tried by a jury. The difference in the mode of trial, consequent upon these different species of claim, shews that the omission in this plea of the particular mode in which the defendant claims his title, is an objection to the substance, and not merely to the form of the plea;

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though that is unnecessary, because a plea in abatement must be good in form as well as substance. Then, is this objection obviated by the statute of *Edward the Sixth*? I think clearly not. The defendant styles himself Lord *Stafford*, Baron *Stafford*, but the mere calling a person a lord will not shew him to be a peer of parliament, as was decided in *Lovel's* case, cited in the Countess of *Rutland's* case (a). But it is said the Court must presume that the defendant is the heir male of the person restored to the title of Lord *Stafford* by the act. If the description of the defendant in the plea were the same as that in the act, which it is not, still it would be necessary for him to aver that he was the heir male; and looking at the act and the plea, before the Court can identify the title in the one with that in the other, they must presume much more than they ought to do in favour of a plea in abatement. There may be other Lords *Stafford*. "Lord *Stafford*" is the only title which the act recites; for though it declares that he shall be a baron, it does not say by what title. It empowers him to bear the arms of the "Barons of *Stafford*," evidently leading to the presumption that the original title had been, not Baron *Stafford*, but Baron of *Stafford*. In either point of view, therefore, this plea is bad. If we exclude the act from our consideration, it is bad for not shewing how the title claimed is derived. If we take notice of the act, as a public act, and whether we can or cannot do so, it is not necessary on the present occasion to decide, (and upon that point, therefore, I express no opinion,) it is equally bad, for not averring that the defendant is the heir male of the person restored to the peerage by the act. For these reasons I am of opinion that there must be judgment of respondent ouster.

HOLROYD, J. concurred (b).

Judgment accordingly.

(a) 6 Rep. 53.

(b) *Littledale*, J., was absent.

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Saturday,  
June 19.

## SKINNER v BUCKEE.

An overseer supplying coals to the poor of his parish in the name of another person, but without any view to his own profit, is not liable to the penalties of 55 G. 3. c. 137. s. 6.

**DEBT** upon the statute 55 G. 3. c. 137, for penalties. The first count charged, that defendant, on &c. was overseer of the poor of the liberty of *Saffron Hill, Hatton Garden, and Ely Rents*, in the county of *Middlesex*, duly appointed in that behalf, to wit, at &c., and that during the time he retained such appointment as aforesaid, to wit, on &c., he did, in his own name, provide, furnish and supply certain goods, to wit, coals, for the use of the workhouse belonging to the said liberty for which he was so appointed, to wit, at &c., contrary to the form of the 'statute, &c., by means whereof, &c. Second count, that defendant did, in the name of a certain other person, provide, &c. for defendant's own profit, coals, for the use of the workhouse, &c. Third count, that defendant was indirectly concerned in providing, &c. for defendant's own profit, coals, &c. Fourth count, that defendant was directly concerned in providing, &c. coals, &c.; but not stating for defendant's own profit. Fifth count, that defendant was indirectly concerned in providing, &c. coals, &c. Sixth count, that defendant was concerned in a certain contract relating to the providing, &c. goods, materials and provisions for the use of the workhouse. At the trial, before *Abbott, C. J.*, at the adjourned *Middlesex* Sittings, after last *Michaelmas* Term, it was proved that the defendant, being a coal-merchant, and having been duly appointed overseer of the poor of the liberty in question, while he continued overseer a quantity of coals was supplied to the workhouse in the name of one *Gaubert*, a brother-in-law of the defendant, and in which the defendant had an

interest. There was, however, no direct evidence to shew that either *Gaubert* or the defendant had realised a profit from the coals, and the learned Judge, being of opinion that, unless the defendant had supplied the goods with the intention of obtaining a profit upon them, the case was not within the statute, directed the jury to find their verdict for the defendant, if they were satisfied upon the evidence that he had not supplied the coals with the intention of obtaining a profit upon them. The Jury found for the defendant.

*Gurney*, in *Hilary* Term last, obtained a rule nisi for a new trial, upon the ground that the learned Judge had misdirected the jury in point of law, against which

*Scarlett* now shewed cause. This case depended upon the construction of the sixth section of the statute. Unless that clause comprehends within its prohibition the buyer as well as the seller of goods supplied to the poor, and the person who supplies with profit as well as him who supplies without, it does not affect this defendant. Now it cannot bear such a construction. The words, "for his own profit," though they are not repeated in the second branch of the section, are evidently intended to apply to every part of it. If, therefore, the defendant had supplied the coals, whether in his own name, or in that of any other person, at their original cost, it is perfectly clear that he would not have been liable under this act, because he would not then have supplied them "for his own profit." Then, neither is he liable for being concerned indirectly or directly in a contract for the supply of coals by another, if he derives no profit from the transaction; for it would be absurd to suppose that the legislature intended to subject a person to a penalty for being concerned with another,

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directly or indirectly, in the very act, which it is evident he may do in his own person without incurring any responsibility.

*Gurney, contra.* The clause in question creates two offences: first, the supplying provisions for the use of the poor, either in the name of the overseer, or of any other person; which must be done with a view to profit, for there the words "for his own profit" are inserted; and second, the being concerned, directly or indirectly, in supplying provisions, or in any contract relating thereto; which need not be done with a view to profit, for there the words "for his own profit" are omitted. What was the object of the legislature in thus varying the language of the act? Clearly this. That although a person who supplied provisions openly, either in his own name or that of another, without profit, might legally do so; yet that he who was secretly concerned in supplying provisions, or in any contract for that purpose, might be liable under the statute, even though he acted without a view to profit, as having had recourse to a species of conduct which, to say the least of it, is extremely suspicious.

ABBOTT, C. J.—This is purely a question of law arising upon the construction of the sixth section of that very wholesome act of parliament, the 55 G. S. c. 137. That section enacts, "that no churchwarden or overseer of the poor, either in his own name, or in the name of any other person or persons, shall provide, furnish, or supply, *for his or their own profit*, any goods, materials, or provisions, for the use of any workhouse, or otherwise, for the support or maintenance of the poor in any parish or place for which he shall be appointed such churchwarden or overseer, during the time which he shall retain such

appointment, nor shall be concerned directly or indirectly in furnishing or supplying the same, or in any contract or contracts relating thereto, under the penalty of 100*l*.” Now, it is perfectly clear, upon the authority of *Gibbs*, C. J., in the case of *Pope v. Backhouse* (a), that if the defendant himself, while overseer, had supplied all the provisions consumed in the workhouse, at their original cost, and without any view to profit, he would have committed no offence within the letter or the spirit of this section. Then, if an overseer, supplying the poor of his parish, in his own name, and to the extent I have imagined, would not be liable under the statute, because he gained no profit by the supply; can it be argued that the same person, by being concerned directly or indirectly in supplying a small quantity of provisions, in the name of another, without profit, would be liable? I think not; such a result would involve a manifest and absurd contradiction in the act of parliament itself. It seems to me, therefore, that the words, “for his own profit,” must be understood as applying to the whole of this section, and that all that the legislature had in contemplation, was, that no overseer for his own profit should supply any provisions to the poor, either in his own or any other person’s name, or be concerned directly or indirectly in any contract made for that purpose. In this view of the statute it is plain that the defendant has not acted so as to have brought himself within its operation, and therefore the verdict was right, and this rule must be discharged.

The other Judges concurred.

Rule discharged.

(a) *J. B. Moore*, 136. 8 Taunt. 248. S. C.

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Saturday,  
July 3.

The KING v. KIDDY.

Where magistrates first took the examination of witnesses, not on oath, in support of a conviction, and afterwards swore them to the truth of their evidence, the Court expressed its disapprobation of the practice.

**THIS** was a motion for a mandamus to magistrates, to set out the evidence taken by them in support of a conviction on the game trespass act. On shewing cause, one objection taken to the mode of proceeding by the justices was, that they had first taken the examination of the witnesses, in support of the conviction, and then administered the oath to the truth of their statements respectively.

The COURT observed, that this was a very irregular and improper practice in criminal cases.

**ABBOTT, C. J.**—Magistrates should understand that the oath is to be administered to the witness before he is examined, and not afterwards.

**BAYLEY, J.**—The answer of the witness is to be taken under the sanction of an oath. Swearing him after his examination is taken, is a very incorrect mode of proceeding, and it is hoped will be discontinued.

As the matter was afterwards settled, nothing came of the motion for a mandamus.

*Adam* was for the crown; and *Chitty* for the defence.

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The KING v. The LICENSING JUSTICES of the WARD  
of FARRINGTON WITHOUT.

Saturday  
July 3.

*H. COOPER* had in *Easter* Term obtained a rule nisi for a mandamus to the licensing Alderman of the ward of *Farringdon Without*, commanding him to hear the application of *A. B.* for a license for *Joe's Coffee House, Fleet Street*, suggesting by affidavit, that the Alderman had refused to hear the application.

Mandamus refused, to command justices to re-hear an application for an ale house license, which they had refused, though it was suggested that their refusal proceeded from a mistaken view of their jurisdiction.

*Hutchinson* now shewed cause on an affidavit that the application had been heard and refused, on the ground that the Alderman had no authority, under the circumstances to grant a license.

*Cooper* admitted that the application had been heard, but refused under a mistaken view of the statute and the object of this motion was to have the application reconsidered upon more mature deliberation.

*Per Curiam.* It being conceded, that the magistrates have heard and determined upon this application for a license, which is a matter peculiarly for their consideration, we cannot grant a mandamus to them to re-hear what they have already determined.

Rule discharged, but without costs.

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Monday,  
July 5.

## The KING v. The Inhabitants of NEWARK-UPON-TRENT.

Where, pursuant to an order of county Justices, overseers of a county parish bound one of their paupers apprentice to a master residing in a borough within the same county, having Justices with exclusive jurisdiction therein, and gave no notice of such binding to the overseers of the borough parish:—

Held, that the indentures were void by 56 G. 3. c. 139. and that a service under them gained the pauper no settlement.  
*Abbott, C. J. dissentiente.*

BY an order of two Justices of the borough of *Newark-upon-Trent*, *William Hales* and his wife, and *Mary* their child, were removed from the parish of *Newark-upon-Trent* to the township of *North Collingham*, both in the county of *Nottingham*. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case:—

The pauper, *William Hales*, a poor boy of, and then legally settled in, the parish of *North Collingham* in the county of *Nottingham*, was on the 18th *June*, 1817, pursuant to an order of two county Justices, bound apprentice by the churchwardens and overseers of the said parish, to *Edward Sutton*, of the parish of *Newark-upon-Trent*, in the borough of *Newark-upon-Trent*, in the county of *Nottingham*, by indenture, for the term therein mentioned. A premium of 10*l.* was given with the apprentice to the master by the said churchwardens and overseers, although only 5*l.* is set forth in the indenture as the sum paid. The two Justices who signed the aforesaid order, afterwards signed and sealed their allowance of the said indenture of apprenticeship before the same was executed by any of the other parties hereto. The said parishes of *North Collingham* and *Newark-upon-Trent* are distant from each other about six miles, and in the same county. No notice whatever was given to the overseers of the poor of the parish of *Newark-upon-Trent*, or to any of them, of the intention to bind out such apprentice, nor did they, or any of them, attend before the Justices who signed the said order,

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and allowed the said indenture, nor any was such notice alleged or attempted to be proved to have been given; but the said Justices allowed the said indenture without any proof of service, or admission of notice. *Newark* is a borough, situate in the county of *Nottingham*, having Justices who have exclusive jurisdiction therein. The pauper resided, under this indenture, in *Newark-upon-Trent* aforesaid, more than forty days. The question for the opinion of the Court is, whether notice ought to have been given to the overseers of *Newark-upon-Trent* of the intention to bind the pauper in that parish, in order to give validity to the indenture, and confer a settlement on the pauper by a service under it, according to the true construction of the statute 56 *Geo. 3. c. 139*.

The case was argued at considerable length last Term by *Chitty*, who contended that such notice was necessary; and by *Scarlett* and *Balguy*, contra. At the close of the argument,

ABBOTT, C. J. observed, that as this was the first time the Court was called upon to put a construction upon this act of parliament, his learned brethren and himself would take time to consider of it.

*Cur. adv. vult.*

The COURT now delivered its judgment; but inasmuch as the Lord Chief Justice differed in opinion from his learned brethren, the Judges delivered their reasons severally, the junior puisne beginning:—

LITTLEDALE, J.—The question in this case arises upon the construction of the statute 56 *Geo. 3. c. 139*. The preamble recites, that grievances have arisen

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from the binding of poor children apprentices to improper persons, residing at a distance from the parishes to which such children belong; and the first section directs, that before any child shall be bound apprentice by the overseers of the poor of any parish, such child shall be carried before two justices of the county wherein such parish shall be situate, who shall inquire into the propriety of binding such child to the person proposed; and shall particularly inquire whether the person proposed reside or carry on his business within a reasonable distance from the place to which such child shall belong, or whether circumstances make it adviseable that such child shall be bound at a greater distance; that the justices shall examine the father and mother of such child, and inquire into the circumstances of the person proposed as the master, and if upon such examination and inquiry they shall think it right that such child should be bound, they shall make an order that the overseers shall be at liberty to bind such child apprentice, which order shall be delivered to such overseers as their warrant for binding such child, and the indenture shall refer thereto, and the justices shall sign their allowance of such indenture before it is executed by any of the parties thereto. Provided that no such child shall be bound apprentice to any person residing or carrying on a business in which such child shall be employed out of the county, at a greater distance than forty miles from the place to which such child shall belong, except such child shall belong to a place more than forty miles from the city of *London*. Then the second section enacts, that in all cases where the residence or establishment of business of the person to whom any child shall be bound, shall be *within a different county or jurisdiction of the peace*, than that within which the place by the officers whereof such child

shall be bound, shall be situate; and in all other cases where the justices for the district or place, within which the place by the officers whereof such child shall be bound shall be situate, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound shall be allowed as well by two justices for the county or district within which the place by the officers whereof such child shall be bound shall be situate, *as by two of the justices for the county or district within which the place wherein such child shall be intended to serve, shall be situate.* Provided that no indenture shall be allowed by any justice for the county into which any such child shall be bound, who shall be engaged in the same business in which the person to whom such child shall be bound is engaged. And notice shall be given to the overseers of the poor of the parish in which such child shall be intended to serve, before any justice for the county within which such parish shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice. Then the third section provides that the allowance of two justices for the county within which the place in which such child shall be intended to serve shall be situate, shall be valid and effectual, although such place may be situate within a town or liberty, within which any other justices may in other respects have an exclusive jurisdiction. And, lastly, the fifth section enacts, that no settlement shall be gained by any child who shall be bound by the officers of any parish by reason of such apprenticeship, unless such order shall be made, and such allowance of such indenture signed, as hereinbefore directed. Now, by the statement in the case, it appears

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that the apprentice originally belonged to the parish of *North Collingham*, in the county of *Nottingham*, and that he was bound apprentice by the churchwardens and overseers of that parish, to a person residing in the parish of *Newark-upon-Trent*, in the borough of *Newark upon-Trent*, in the county of *Nottingham*, in which borough the justices have an exclusive jurisdiction. It appears that the justices who signed the order for the binding of this apprentice resided in the county, but that no notice was given by the overseers of *North Collingham* to the overseers of *Newark-upon-Trent*; and we are to say whether or no any settlement could be gained by service under such a binding. To determine this point, it is not necessary to consider whether notice in all cases ought to be given, or whether the necessity of notice to the overseers of the parish into which the child shall be bound, is to be confined to the case where the child is bound into a parish, within a district, the justices of which have a different jurisdiction from that of the justices of the parish to which the child may belong. There seem to me to be reasons for holding that in the same county notice is not necessary, because the county justices have more power and better means of information, by communicating with the overseers within their own jurisdiction, so as to point their inquiries with more effect as to the propriety of the binding, the circumstances and character of the intended master, and the opportunities which the child will have of acquiring a knowledge of his business: whereas in a foreign county, the justices are less acquainted, and have not the same means of communicating with the overseers, nor the same means of inquiring into the circumstances of the case. Again, it appears from the second section of the statute, by which the notice is required, that notice would not be necessary where the binding is into the

same county; because, as that section begins with making provisions for cases in which the binding is into a different county, all its provisions must be construed as having reference to cases of that kind. This reason cannot, indeed, be considered as conclusive, because the division of the statute into sections is a mere arbitrary act, and cannot afford any rule for the proper construction of any of the sections. The only true guide for the right interpretation of any clause, is to look into the language of the clause itself, and to compare it with the other enactments of the statute, without attending to its division into sections. Undoubtedly, a great deal may be said upon both sides of the question, arising from the form in which the different sections are framed. In the first section there is no express mention of notice at all; that appears for the first time in the second section, and there is so much variation of the phraseology of that section, in the different parts of it, and with reference to the first section, that it is perhaps not easy to reconcile the two. Without, however, entering into a discussion on that point, I think it is clear that where the binding is into a different county, notice is indispensably necessary, unless it can be said, either, that the second section, which requires notice, is merely directory, or, that the clause in the third section, which provides "that the allowance of two justices for the county within which the place in which such child shall be intended to serve shall be situate, shall be valid and effectual, although such place may be situate within a town or liberty, within which other justices may, in other respects, have an exclusive jurisdiction," does away the necessity of notice, where the justices actually exercise the power so vested in them. In the first place, I am of opinion, that the second section is not merely directory. The object of that provision seems to be, that the overseers of the

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parish situated in the foreign county, may assist the justices of the county in which the binding parish is situated, with all the information they possess upon the matters submitted to their investigation, and therefore the notice to those overseers seems to be essential; though, certainly, the fifth clause, which declares, that no settlement shall be gained unless such and such provisions are complied with, contains no mention of notice to the overseers. The words are, "that no settlement shall be gained by any child who shall be bound by the officers of any parish by reason of such apprenticeship, unless such order shall be made, and such allowance of such indenture of apprenticeship shall be signed, as hereinbefore is directed;" which seems to be tantamount to saying, that if the order is made, and the allowance is signed, the binding shall confer a settlement, although no notice is given. But, as the second section directs that the justices of the foreign county shall not allow any indenture, until notice has been given to the overseers, and shews therefore that the service of notice upon the overseers is a duty precedent to the allowance of the indenture by the justices; the clause in the fifth section, requiring the allowance of the justices, must, I think, be taken as embodying the provision in the second section, and therefore as meaning an allowance after notice. Then, in the second place, is the notice to the overseers rendered unnecessary, where the justices for the county exercise the powers vested in them by the third section? It is certainly not dispensed with, in terms, by the third section, and I can see no reason why it should be dispensed with, merely because the justices for the county put themselves in the place of the justices for the foreign district. By so doing, they cannot acquire a greater power than belongs to the persons whom they represent; and as the justices for the foreign district

cannot, by the second section, allow the indenture, until notice has been given to the overseers, it follows that the justices for the county, acting in a representative character, have only a conditional power of allowing the indenture, namely, after the overseers have had notice. It may be argued, that by the third section the separate jurisdictions are all swallowed up, and made to form parts of the county, for the purposes of this act; and that the powers vested in the county justices, place them precisely in the same situation, with respect to those districts, as if they had an original jurisdiction over them, so that they are entitled to act as if those districts were actually parts of their own county. Assuming that argument to be correct, it becomes necessary to consider, whether the statute requires notice in all cases, including those of bindings into the same county; but the statute certainly does not in express terms give the county justices any such power as that argument supposes, nor, in my opinion, is it probable, that the legislature had any such intention; because, if the motive for requiring notice is, that the justices for the county within which the binding parish is situated, have not the same means of communication, or the same sources of information, in the foreign county, as they have in their own; they may, if no notice is given, bind the child into a county, where they are unable to obtain that full knowledge and information which the statute makes it incumbent on them previously to obtain. The third section is not compulsory upon the county justices; the district justices may still allow the indenture, after notice to the overseers; there may, therefore, be two children bound out of the same parish into the same foreign district by two different modes: one by the county justices only, (and here I do not include the binding overseers,) and another by the county justices, coupled with a notice to the over-

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seers, and the allowance of the foreign district justices. Now the latter binding would, in all probability, be done after a much fuller investigation and inquiry than the former, and therefore the two bindings would be accompanied by different degrees of information as to the propriety of the binding. It may be said that the statute expressly authorises the county justices to allow the indenture, where the child is bound into a foreign district, and that, therefore, under such circumstances, the binding will be effected without the full and proper means of inquiry and information. But, I think, that evil can hardly occur, because there will be very nearly the same information obtained, as if the indenture were allowed by the foreign district justices; for the overseers, when they have received notice, will collect what information they can, and will communicate it to the county justices, before the indenture is allowed. I am, therefore, of opinion, that the indenture in this case is rendered invalid by the want of notice to the overseers, and consequently that the pauper acquired no settlement by service under it.

HOLROYD, J.—This was the case of a binding by the churchwardens and overseers of a parish within the county of *Nottingham*, made under the allowance of two justices for that county, to a master resident within the parish and borough of *Newark-upon-Trent*, within the same county, but in which other justices have an exclusive jurisdiction. The question for our consideration turns upon the construction of the statute 56 *Geo. 3. c. 139*; section 3 of which provides, that the allowance of two justices for the county within which the place in which such child shall be intended to serve an apprenticeship shall be situated, shall be valid and effectual, although such place shall be situated within a town or liberty within which other justices may, in other respects, have an exclusive jurisdic-

tion. The objection, however, arises upon the proviso at the close of section 2., which requires notice, or proof, or admission of notice, to the overseers of the parish in which the apprentice is to serve, before the allowance of the indenture; and the question is, whether such notice, or proof, or admission of it, was necessary in the present case. I am of opinion, that it was, and that for want of it, this indenture was invalid, and no settlement was gained by service under it. The proviso as to notice appears to me not to be directory only, but I think the want of it goes to affect the settlement itself. Section 5, which enacts, that no settlement shall be gained by any child who shall be bound by the officers of any parish, by reason of such apprenticeship, unless such order shall be made and *such* allowance of such indenture shall be signed as previously directed, does not indeed go on to enact, "that no settlement shall be gained unless such notice shall be given;" but, in cases where notice is required, unless the notice was previously given, the allowance would not be *such* as the statute requires, and therefore would be null and void, because where an act of parliament gives a magistrate a special and limited authority, his acts are null and void unless he complies with the regulations and restrictions so imposed upon him. I presume that the legislature, in requiring this notice, had two objects in view, the benefit and welfare of the apprentice, and the protection of the parish into which he was to be bound, and for both those objects the notice would be useful before the binding was complete; as respects the information, the overseers might give the magistrates, first, as to the character, conduct, habits, and circumstances of the intended master; and second, as to the particular trade, its extent in the parish, the number of apprentices engaged in it, and the probability of the child being able thereafter to maintain himself by it, or

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becoming a burthen upon the parish. And this would be equally material whether the binding was to be into a parish within the same, or a different county; because, in either case, the parish might be equally aggrieved by the binding, and by the want of notice, as they might thereby lose their right of appeal, which, by section 17, can be exercised only within a limited period. In order to remedy the grievances enumerated in the preamble of the act, section 1 enacts, that where the binding is to be into the same county, the county justices shall inquire into all these circumstances, and shall sign the allowance; and section 2, in addition provides, that where the binding is to be into a different county, two justices of that county in which the apprentice is to serve, shall concur in making the inquiry, and in signing the allowance. Then comes the proviso upon which the present question is founded, which is printed as a part of section 2; but whether it is to be taken as a part of that section, or as constituting a separate one, is wholly immaterial to the construction of the statute; for on such occasions, in order to decide whether a proviso partially or wholly relates to the *immediately* preceding provisions, so as to qualify, restrain, or vary their operation, or relates partially or wholly to *all* the preceding matters of the statute, we must look at the statute as a whole, at its language, object, and import, and not to the arbitrary division of it into different sections. The proviso is, "that no indenture shall be allowed by any justice for the county *into which such child shall be bound*, who shall be engaged in the same business, employment, or manufacture, in which the person to whom such child shall be bound is engaged." Now this part of the proviso I think is confined to the allowance of magistrates not of the same county, and refers only to cases where there is a binding from one county into another, and the expression, "the county

into which such child shall be bound," appears to me the mark by which the legislature intended to point out that the construction of this part should be so confined, for it evidently implies that there is another county *out of which* the child shall be bound. The proviso then goes on, "and notice shall be given to the overseers of the poor of *the parish or place in which such child shall be intended to serve an apprenticeship*, before any justice for the county or district within which such parish or place shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice, and admit such notice." Here the language is changed, and we have expressions, with respect both to the justices and the overseers, which seem to me to apply to both descriptions of bindings, for here the notice is required to be given, not to the overseers "of the parish or place within the county into which such child shall be bound," but to the overseers "of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice for the county or district within which *such* parish or place shall be, shall allow such indenture ;" that is, the parish or place in which the child is intended to serve, whether it be within the same or a different county. Here the legislature having intended, as I think, to restrict the first part of the proviso to bindings into a different county, and having clearly expressed that intention, adopts a different and more extensive mode of expression, which comprehends the whole object of the statute, namely, parish apprentices and bindings generally, and not merely bindings into a different county. This proviso is immediately followed by another in section 3, which runs thus: "Provided always, and it is hereby declared, that the allowance of two justices *for the county within which the place in which such child*

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shall be intended to serve an apprenticeship shall be situated, shall be valid and effectual, although such place may be situated in a town or liberty within which any other justices may in other respects have an exclusive jurisdiction." It is admitted that this section applies to parish apprentices and bindings in general, and yet the language is the same as that of section 2. Unless the proviso in section 3 extends to parish apprentices bound to serve in the same county, the want of an allowance by two justices for the exclusive jurisdiction of *Newark-upon-Trent*, would be fatal to the settlement claimed in this case; and if it does so extend, then, I would ask, by what rule of construction is it to be said, that there is to be a different mode of interpretation given to the proviso in the second, from that which is given to the proviso in the third section? If the same mode of interpretation is to be given to both, then no settlement has been gained in *Newark*, for in either case the indenture is ineffectual for that purpose; in the former, for want of the allowance of two justices of *Newark* as an exclusive jurisdiction; in the latter, for want of notice to the overseers of *Newark*. I think the term, "such child," in the proviso in section 2, includes parish apprentices in general; and that the terms, "such parish or place," and "such indenture," and "such justice," there, as well as the term "such place," in section 3, mean the place in which the apprentice is intended to serve, and the indenture by which he is bound so to serve, whether the binding is into the same, or into a different county. In the present case, the overseers of the parish of *Newark*, in the borough of *Newark*, are the overseers of the parish in which the child was intended to serve his apprenticeship; and, I think, they were within the description of persons entitled to notice within the words of the proviso, although their parish is in the same county as the

binding parish: and no such notice was given them. If they are within the *words*, they must also be taken to be within the operation of the proviso, more especially as the notice, I think, must be taken to be for the protection of the apprentice himself, unless a different intent can be gathered from the context. As it seems to me, no such different intent can be so gathered, but an inference directly the contrary must be drawn, the evident intent being, that notice should be given to the overseers of the parish in which the apprentice is to serve, in all cases, whether the binding is into the same, or into a different county. I have considered this case in great measure without regard to the circumstance of the binding being into a different jurisdiction, taking it merely as a binding into the same county, under the idea that by the third section the circumstance of an exclusive jurisdiction is immaterial. It may perhaps be a question, whether that section, by making valid an allowance by the county justices without the co-operation of the district justices, does away the necessity of notice to the overseers, if notice were otherwise necessary; but in the view I have taken of the case, I do not feel it requisite to consider that point. For the reasons I have given, I am of opinion, that the pauper did not acquire a settlement in the parish of *Newark-upon-Trent*.

BAYLEY, J.—This case has been so fully discussed by my Brothers *Holroyd* and *Littledale*, with whom I agree, that it is the less necessary for me to enter at length into the grounds upon which my opinion is founded. The first section of the statute applies generally to all cases, and directs what the justices and the overseers are in *all* cases to do, and it imposes no qualification as to the justices, nor does it contain any restriction, except as to the distance of the master's resi-

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dence and business. The 2d section introduces two provisions, one to exclude justices who may be supposed to be interested, being of the same business with the intended master; the other to require notice to the overseers of the parish in which the apprentice is to serve. Whether these provisions, or either of them, are general and applicable to all cases, or whether they are confined to the particular cases contemplated in the earlier part of that section, may admit of doubt; for the nature of the provisions has a tendency to shew that they are general, while their position in the act has a directly contrary tendency. If they are intended to be general, the first question is, whether this case is within the earlier part of the 2d section; and if it is, then there arises another question, namely, whether the case is taken out of the 2d, by the operation of the 3d section. The earlier part of the 2d section contemplates two distinct cases; the one, where the master's residence or business is in a different *county or jurisdiction* from that of the binding parish, and the other, where the justices for the *district or place*, in which the binding parish is, have not jurisdiction: in either of which cases it provides, that the indentures shall be allowed as well by two justices for the *county or district* within which the binding parish is, as by two justices for the *county or district* in which the apprentice is intended to serve. In this case the binding parish is *North Collingham*, which is within the county of *Nottingham*, and the parish in which the service was to be, is *Newark-upon-Trent*, which is within the borough of *Newark-upon-Trent*, and in which the county magistrates have no jurisdiction. The master, therefore, carried on his business in a different jurisdiction from that of the binding parish, which brings the case within the words of the first clause of the 2d section; and the justices of the place in which the binding parish is, have

no jurisdiction, which brings the case within the words of the 2d clause of that section : and I can find nothing in principle, or in the other provisions of the statute, that excludes it from either. The object of the act was to give protection to parish apprentices, and to enable magistrates to prevent abuses in binding them out, and it is consistent with and in aid of that object, that the act should extend to every case that can fairly be brought within its operation. The only ground upon which, as it seems to me, any doubt can be raised upon the meaning of the legislature in this respect, is the variation of the phraseology used with reference to the justices. In the first section they are called "the justices of the peace for the county, riding, division, or place;" in the 2d, in one part of it, "the justices of the peace for the district or place," and in another part, "the justices of the peace for the county." Whether this variation was accidental or intentional I cannot discover, but, be that as it may, I think the language is too loose to form a ground for a court of justice to act upon, and to say that a different operation was intended by the difference of phrases thus adopted. I am, therefore, satisfied that this case is within the 2d section, unless it is taken out of it by the 3d section. That section provides that an allowance by two justices of the "*county*," dropping the words "district or place," in which the place of service is situate, shall be valid, although that place is within a town or liberty where other justices have an exclusive jurisdiction. It does not state that such township or liberty shall, for the purposes of this act, be deemed to be a part of the county in which they are situate; but simply that the allowance of two justices for the binding county shall be valid. It does not in terms supersede the excluding restriction, that the justices shall not be of the same business, nor does it expressly dispense with the

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notice to the overseers; and, it seems to me, the true construction of the 3d section is, that in a case like this, to which both the 2d and 3d sections are applicable, the allowance by the original magistrates, as required by the 1st section, is not sufficient, unless they are exempt from the excluding restriction of the 2d section, as being of the same business with the master, and unless notice has been given to the overseers of the place in which the apprentice is to serve. If the service is to be in the same county out of which the binding is, then the justices of that county may, from their situation as the acting bench of magistrates, be fairly supposed to be fully acquainted with all the circumstances of every part of their own county, so as to render information from the overseers to them unnecessary: but in places of exclusive jurisdiction, though within their own county, where they have no right to interfere, and of the circumstances of which they may have no knowledge, that may not be the case, and the information of overseers may be particularly necessary and useful. I am, therefore, of opinion, that in this case there ought to have been a notice to the overseers of the parish in which the service was to be, before the binding took place, and that for want of such notice the indenture was invalid, and no settlement has been gained by service under it.

ABBOTT, C. J.—I have the misfortune to differ from my learned brothers on this occasion, and notwithstanding the great ~~and~~ unfeigned respect I entertain for their opinions, I still think ~~that~~ a settlement has been gained in *Newark*, under the circumstances of this case. It is not necessary to repeat the facts: the question arises upon the statute 56 *Geo. 3.* c. 139. By the 5th section of that statute it is declared, that no settlement shall be gained by any apprentice, unless such order shall be made,

such allowance of such indenture shall be signed, as hereinbefore directed. The statute, in some of its provisions, is introductory of a new law, and as non-compliance with its directions will prevent the gaining of a settlement, I apprehend, that according to general principles the construction of the statute should not be extended beyond the plain and obvious meaning of the words of its directions, upon any supposition that a case not within that meaning, may be within the mischief intended to be remedied, or within the reasons which the directions may be supposed to have been intended to be remedied. I think the directions of this statute may properly be divided into two classes, the first applying to the case of binding a parish apprentice, and the second applying only to certain particular bindings with respect to the local authority of the justices of the peace. I will order all the directions of the first class to be arranged together, and to form the 1st section of the statute; that those of the second class are in the same manner arranged in order together, and form the 2d section; and that the 3d section is explanatory only of the jurisdiction of the justices. The directions of the first class are three. First, the duty of the justices to inquire into the fitness of the master, the distance of his residence, and other particulars in which the interests of the apprentice are concerned. Second, if upon inquiry they approve of the binding proposed, to make an order directing the overseers to bind the apprentice, and that order is by the terms of the statute to be delivered to the overseers as their warrant for binding the apprentice, and to be referred to in the indenture by the name of the order, and the names of the justices: and, third, the signature of the allowance of the indenture by the justices, the making of the order, and before the execution of the indenture by any of the other parties to it. These

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apply to every case of every binding, without regard to the jurisdiction within which the master's parish may be situate, and are followed by a proviso applicable to them, not containing any general regulations as to the binding of an apprentice to serve in a different county; but prohibiting the binding him to serve in a different county at a distance of more than forty miles from the parish to which he belongs, except that parish is more than forty miles distant from *London*, in which case the justices, when the binding is to a place more than forty miles distant, are to make a special order, specifying the grounds on which they have thought proper to allow a binding to the greater distance. Thus far all the enactments regard only the justices of the county to which the apprentice belongs, and whether we attend to the whole as comprising one numbered section, or look exclusively to the order and disposition of the sentences, which I think is the more correct mode of reading an act of parliament, the effect will be precisely the same. I come now to the second class of directions, which, as I have already stated, I consider to constitute the 2d section of the statute. That section provides "that in all cases where the residence or establishment in business of the person to whom any child shall be bound, shall be within a different county or jurisdiction of the peace from that within which the place, by the officers whereof such child shall be bound, shall be situate; and in all other cases, where the justices of the peace for the district or place within which the place, by the officers whereof such child shall be bound, shall be situate, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound, at any time after the said first day of *October*, shall be allowed as well by two justices of the peace for

such allowance of such indenture shall be signed, hereinbefore directed. The statute, in some of its provisions, is introductory of a new law, and as non-compliance with its directions will prevent the gaining of a settlement, I apprehend, that according to general principles the construction of the statute should not be extended beyond the plain and obvious meaning of the language of its directions, upon any supposition that a case, not within that meaning, may be within the mischief intended to be remedied; or within the reasons upon which the directions may be supposed to have been given. I think the directions of this statute may properly be divided into two classes, the first applying to every case of binding a parish apprentice, and the second applying only to certain particular bindings with respect to the local authority of the justices of the peace. I consider all the directions of the first class to be arranged in order together, and to form the 1st section of the statute; that those of the second class are in the same manner arranged in order together, and form the 2d section; and that the 3d section is explanatory only of the jurisdiction of the justices. The directions of the first class are three. First, the duty of the justices to inquire into the fitness of the master, the distance of his residence, and other particulars in which the interests of the apprentice are concerned. Second, if upon inquiry they approve of the binding proposed, to make an order authorising the overseers to bind the apprentice, and in which order is by the terms of the statute to be delivered to the overseers as their warrant for binding the apprentice, and to be referred to in the indenture by the justices and the names of the justices: and, third, the signature of the allowance of the indenture by the justices, either the making of the order, and before the execution of the indenture by any of the other parties to it. These

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jurisdiction of different justices; and the second allowance must be by the justices of the local jurisdiction within which the master's parish is situate, whether in the same county as the parish of the apprentice or not: and if both parishes happen to be within the same county, and that of the apprentice is within a local jurisdiction, and that of the master within the county at large, the second allowance must be by the justices of the county at large. It is clear, however, that some qualification is introduced as to this matter by the 3d section, though before I notice that more particularly I beg to advert again to the 2d section. The part of that section which immediately follows that enactment before detailed, commences, as I have already observed, with the word "provided," and runs thus: "Provided always that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound, who shall be engaged in the same business, employment, or manufacture, in which the person to whom such child shall be bound shall be engaged." This proviso appears to me to relate only to those cases which form the subject of the preceding enactment, as well by reason of its situation in the statute, as of the expression, "into which such child shall be bound," which I consider plainly to denote a county other than that to which the child belongs, and *in which* the binding is allowed at the discretion of the justices. The following sentence is introduced by the conjunction "and," which sensibly connects it with the preceding words, and thereby confines its application to the cases just before mentioned. The sentence is this: "and notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of peace for the county or district, within which such parish or place shall be, shall allow such indenture; and such notice shall

be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice." If the act had said nothing further on the subject of the jurisdiction of the justices, I cannot satisfy my mind that it ever could have been doubted that the whole matter of this section was confined to those cases in which an allowance of the indenture by two sets of justices, belonging to two distinct jurisdictions, was required. That doubt, as it seems to me, has arisen from the matter contained in the 3d section, which begins, like the 2d, with the word "provided," and which appears to me, to form a continuation of the 2d section, and to be a qualification of those cases, and those only, which constitute the first part of that section, namely, the cases of different jurisdictions of justices. The words are these: "Provided always, and it is hereby declared, that the allowance of two justices of the peace for the county, within which the place *in which* such child shall be intended to serve an apprenticeship shall be situate, shall be valid and effectual, although such place may be situate in a town or liberty within which any other justices of the peace may, in other respects, have an exclusive jurisdiction." I consider this section as giving jurisdiction to the county justices, whether the town or liberty is within the county to which the master only belongs, or within the county to which both master and apprentice belong; but I think it gives it only as respects the master's parish: so that, where the child belongs to a town or liberty, and is bound to a master who resides out of that town or liberty, the inquiry in the first instance as to the fitness of the master, and the original allowance of the indenture, must be by the justices of the town or liberty. So applying this section to the case before the Court, I think the question is the same as it would have been if there were no justices having an exclu-

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sive jurisdiction in the town of *Newark*, and that would be, whether, for a binding to a master residing in the same county to which the apprentice belongs, notice of the binding to the overseers of the master's parish would be necessary. I have already observed upon the situation which this clause, requiring notice, occupies in the statute, and upon its connection with the immediately preceding sentence by means of the conjunction "and," and have said that I consider such case, also, as relating only to the justices of, what I may call, the second jurisdiction. If it had been intended that notice should be given to the overseers of the master's parish, in any case, I cannot forbear thinking, that there would have been some distinct enactment to that purport, and that it would not have been left to depend upon expressions immediately following and closely connected in language with an enactment confined to certain particular cases only. I cannot say that I have discovered any reason for thus expressly requiring notice to the overseers, where the binding is into a different county, which would not apply with nearly equal force to a binding into the same county. But it must be observed, that the legislature have, in the 1st section, expressly required that the justices of the county to which the child belongs shall inquire into the fitness of the master and the distance of his residence; and it was, perhaps, presumed, that where the justices in the performance of that duty should think a notice to the overseers of the master's parish necessary, they would order such notice to be given, because the statute imposed no special duty of that kind upon the justices of the master's county: and, in my mode of construing the statute, there is a special qualification respecting those justices, that they shall not be engaged in the same business with the master; and the notice, therefore, may have been required in this case, as well for the purpose of

supplying the absence of that inquiry which is expressly directed in the other, as of providing that the indenture shall not be allowed by any justice engaged in the same business with the master. Further, it seems to me, that if such had been the intention of the legislature, they would have introduced into the clause requiring notice such words as would have shewn that notice was to be given whether the two parishes were in the same or different counties, and that, when both parishes were in the same county, the notice should be given not only before the allowance of the indenture, which is merely a ministerial act, but before the making of the order for the binding, which is the important act: for it cannot have been meant that the same justices who had made an inquiry and an order for the binding, should afterwards give the overseers of another parish the opportunity of appearing before them, when the result of their so appearing might be the rescinding of the order. If notice to such overseers is to be required, I think it should be required in the first instance, before the order for the binding is made. If the notice is confined to the allowance of the indenture by the justices of a different county, it is required before the performance of any of the acts to be performed by them. Unquestionably the notice is required only with reference to the allowance of the indenture by the justices of the master's county. If it is required when the master's county is also the county of the apprentice, then, as I have before shewn, it will be required in some cases before the allowance of the indenture by the binding justices, and in others not; and which those cases are, as distinguished from each other, the statute will not clearly point out. According to my construction of the statute, the several duties imposed upon the justices of the two jurisdictions will in every case be apparent, detailed in a plain and intelligible

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order, free from confusion of arrangement, and perplexity of language. For these reasons, I am of opinion, that notice to the overseers is not required when the master and the apprentice are resident in one county. The statute, upon which the question has arisen, is certainly not without ambiguity. If its directions are not complied with, I have before mentioned that a settlement cannot be acquired under circumstances in which, before the passing of this act, it might have been acquired. I have felt myself bound to form my judgment upon what appeared to me to be the real sense and meaning of the words of the statute, paying due regard to the order, arrangement, and connection of the several matters contained in it; and I have the satisfaction of knowing, that if my construction is erroneous, the error will not be of any practical importance, because the opinion of my learned brothers must of course prevail, and the rule for quashing the order of sessions must be made absolute.

Rule absolute for quashing the order of sessions.

Monday,
July 5.

The KING v. The MAYOR and ALDERMEN of the
BOROUGH of PORTSMOUTH.

Mandamus does not lie to the mayor and aldermen of a borough, requiring them to assemble for the purpose of considering the propriety of removing non-resident mem-

bers of their body, no serious injury or inconvenience to the inhabitants being suggested, as resulting from such non-residence.

MEREWETHER on a former day obtained a rule, calling upon the mayor and aldermen of the borough of *Portsmouth*, to shew cause why a mandamus should not issue directed to them, commanding them to assemble themselves together within the borough, and *consider of the propriety* of removing certain persons, by name, from the office of alderman, on the ground of non-residence within the said borough.

On shewing cause, the case disclosed upon the affidavits was this:—The town of *Portsmouth* is a borough by prescription; but by a charter of *Charles I.* that king, in the thirteenth year of his reign, granted that the mayor, burgesses and inhabitants, should be incorporated by the name of “the mayor, aldermen, and burgesses, &c. ;” that there should be within the borough one alderman elected mayor, and that there should likewise be within the borough twelve other burgesses to be elected as therein mentioned, who should be aldermen; and that the aldermen for the time being should be called the council of the borough, and should be from time to time aiding and assisting the mayor in all matters and causes touching or concerning the borough; that whensoever any of the aldermen for the time being, should die or be removed from office, (which aldermen, or any of them, the king willed should be removeable *for any offence, or default, or reasonable cause*, at the discretion of the mayor, and the rest of the aldermen of the borough for the time being, or the greater part of them;) then it should be lawful for the mayor and the rest of the aldermen for the time being, or the greater part of them, to elect one other or more of the burgesses of the borough to supply the place of the alderman or aldermen happening to die or be removed; that any person elected mayor or alderman, refusing to accept the office after notice, should be subject to such fines and amerciaments as should seem reasonable to the mayor and aldermen, or the major part of them; that there should be a recorder elected by the mayor and aldermen; and that the mayor, aldermen and burgesses, might have a court of record to be holden before the mayor, recorder, and aldermen, or any four of them, of whom the mayor or recorder should be one, every *Tuesday*; that the mayor and recorder, and every mayor for one year, after serving the office

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of mayor, and three other aldermen, should be justices of the peace for the borough, to be elected annually by the mayor, aldermen, and burgesses; and in case of death or vacating the office of alderman, another to be elected in his room. There was no clause in the charter, expressly requiring that the aldermen when elected should be resident within the borough. It was alleged in the affidavits that the aldermen, against whom this application was directed, had resided out of the borough for a great many years; and that one of them, who had been elected one of the justices of the peace for the borough, resided seven miles distance from the town, but always attended to his magisterial duties when his attendance was necessary. No inconvenience to the inhabitants of *Portsmouth* was alleged, nor was any delay of justice complained of, as arising from the non-residence of the individuals named in the rule. The only instance pointed out of a delay of justice was, that in 1817 the borough court did not sit on the day appointed, and the court adjourned until the next day. Under these circumstances, the question was, whether the aldermen were bound to reside independently of the provisions of the charter.

Scarlett, Adam and Erskine, (with whom was *Selwyn*,) shewed cause against the rule. If this case were to depend upon the merits as disclosed in the affidavits, there is no ground whatever for supporting the motion; because there is no pretence for saying that any inconvenience or delay of justice to the inhabitants of *Portsmouth* has arisen from the non-residence of the aldermen. But the decisive answer to it is, that there is not a word in the charter which imposes upon the aldermen the necessity of actually residing within the borough. The supposed an-

authority for this application is *Rex v. Truro* (a); but that case is totally dissimilar. That was an application for a *quo warranto* information to an individual calling upon him to shew by what authority he claimed to be a capital burgess of the borough of *Truro*, on the ground that by the express terms of the charter of that borough, no person could hold the office of a capital burgess who resided out of the borough, the fact being that the defendant had gone to reside out of the town. The Court refused the application; but upon referring to the particular words of the charter, they said that a rule nisi for a mandamus might be granted, commanding the corporation to meet for the purpose of considering whether they would or would not remove a capital burgess who had gone out of the town to dwell. That case, however, depended entirely upon the particular wording of the charter, and certainly is no precedent by which the Court can be governed in this instance. Admitting, for the sake of argument, that the charter in the present case required the aldermen to reside, still unless there was a strong case made out of inconvenience or prejudice to the inhabitants, the Court would not interfere. Non-residence is not ipso facto a ground for removal from the office of alderman. A real and substantial grievance must be made out before this Court can interfere, and even then it would be entirely a matter of discretion with the mayor and the rest of the aldermen, whether they would or would not remove the non-resident members of the corporation. The charter gives to the mayor and aldermen a discretionary power to remove "for any offence or default, or reasonable cause;" but if no inconvenience resulted to the town from the non-attendance of some of the aldermen, they would not be justified in removing them. Here no

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(a) Not reported. It was decided in *Hilary*, 1821, before this series of reports commenced.

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inconvenience is suggested, no delay of justice is complained of, and therefore without some express authority, shewing that non-residence merely is a ground of a motion, this rule must be discharged. The charter declares, that five of the aldermen shall be justices of the peace. Now four of these actually reside, and the fifth lives within a short distance of the town, and always discharges his magisterial duties. This being an application of the first impression, and there being no pretence for it, the rule must be discharged.

Copley, A. G., Gaselee and Merewether, contra. In *Rex v. Monday (a)*, which arose upon the same charter, Lord *Mansfield* decided that when an alderman was once elected, it was his duty to reside. That learned judge, speaking of the provisions of the charter, said "residence is not a precedent qualification for a burgess to be elected an alderman. All the charter requires is, that *after* he is elected he shall be resident." [*Abbott, C. J.* That was certainly an obitur dictum. There is nothing in the charter which warrants that position.] The use, however, to be made of what was said by that learned judge is, that it confirms what has been laid down in a variety of cases, namely, that when the charter of a corporation requires that the capital burgesses or aldermen shall be resident, it is nothing more than a declaration of the common law. In *Vaughan v. Lewis (b)*, Lord *Holt* so expressed himself; and the same principle was laid down in the *City of Exeter v. Glyde (c)*. Hence it follows, that whether a clause be or be not introduced into a charter, expressly requiring residence, is a matter perfectly indifferent, because at common law, residence is a duty incident to the office; and non-residence is a

(a) Cowp. 530. (b) Carth. 227. (c) 4 Mod. 33. Holt, 435, S.C.

disqualification when it is satisfactorily proved. The persons against whom this motion is directed are not justices of the borough, but aldermen, whose duties necessarily require residence. By the charter, they are the council of the borough, and are required from time to time to aid and assist the mayor in all causes and matters touching or concerning the borough. Every alderman is bound to attend the court of record held in the borough, although five are sufficient to constitute a court. The only question then is, as to the course to be pursued to enforce the residence of absentees. This can only be done by mandamus. It is a mistake to suppose that this is a case of the first impression. In *Rex v. Truro* the rule for a mandamus was made absolute, although the matter was not carried farther. That case was, however, much weaker than this, for there the burgess actually resided just out of the town; but here, the aldermen in question live in different parts of the country, some in *London*, and one is actually out of the kingdom. But before the case of *Rex v. Truro*, it was said by *Ashurst, J.* in *Rex v. Heaven (a)*, that “when a corporator neglects the duties of his office, the corporation should first take cognizance of it, and deprive him, and then it may be properly brought before this Court. And there is no inconvenience in this mode of proceeding; for if any persons find themselves injured by the non-residence of a corporator, and the corporation refuse to interfere and to do their duty, such persons may apply to this Court for a mandamus, directed to the corporation, to enforce a performance of their duty.” That case shews, that a quo warranto information will not lie until the aldermen have been removed; and therefore the only mode of proceeding is by mandamus in the terms of

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(a) 2 T. R. 772.

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the present rule. It is of great importance to the town of *Portsmouth* that the residence of the aldermen should be enforced. This application is connected with the administration of public justice, and stands upon a very different footing from the case where the object is to enforce the performance of a mere ministerial duty. At common law it is the bounden duty of an alderman to reside in the place of which he is a magistrate; and admitting that residence is not required by the express terms of the charter, still it is a duty arising by necessary implication. Here there has been default in persons standing in the situation of public officers, and therefore, according to the principle laid down in *Bull. N. P.* 199. and 3 *Black. Com.* 264. the mandamus in such case is a writ of right to which the subject is entitled. In *Reg. v. Truebody* (a), *Rex v. The Mayor of Shrewsbury* (b), *Rex v. The Corporation of Leicester* (c), and *Rex v. Ponsonby* (d), non-residence was considered such a breach of duty in a corporator, as to justify his amotion. Sufficient inconvenience has already been pointed out to warrant the interposition of the Court; and considering the importance of the case, as it affects the due government of every corporation in the kingdom, the Court will at least require the mayor and aldermen to meet for the purpose of considering the propriety of exercising the power of amotion with which they are vested.

ABBOTT, C. J.—Applications like the present have not been made to the Court until very recently. They have probably grown out of the dictum of *Ashurst, J.* in *Rex v. Heaven*. What that learned Judge says is, "If any persons find themselves injured by the non-residence


(a) 2 *Ld. Raym.* 1275.(c) 4 *Burr.* 2087.(b) *Cas. temp. Hard.* 147.(d) 1 *Ves. jun.* 1.

of a corporator, and the corporation refuse to interfere and to do their duty, such persons may apply to this Court for a mandamus, directed to the corporation, to enforce a performance of their duty." The case, therefore, put by the learned Judge to justify such an application, would be, where persons find themselves *injured* by the non-residence. That is the ground there suggested. There is no doubt that a person who accepts an office in a corporation, thereby tacitly engages to take upon himself the duty of giving such attention to the office as the public convenience may require; and where the public convenience requires it, residence, by the common law, is a part of his duty. But if we yield too readily to applications of this nature, we may expect much litigation and serious inconvenience to ensue. Unless we make the convenience or inconvenience resulting to the public from non-residence of corporate officers, the ground of inquiry and rule of our decision, it will lead to an infinity of applications to the governing power of corporations to remove members of the select body, no matter how large the whole number may be. It seems to me, that we ought not to yield to an application of this nature, unless we saw ~~that~~ there was a *serious* inconvenience sustained, which required this Court to interfere and put the corporation in motion. Now, from the affidavits before the Court, it does not appear to me that there is that serious inconvenience which should call upon the Court to interfere. The non-residence of some of the aldermen rather casts a burthen upon the others, than produces inconvenience to the inhabitants at large, because it compels the few who are resident to be more active in the discharge of the duty of their office, than if there were others to share it with them. It does not appear that those who are resident think the presence of their brethren necessary; and this application is not

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made by them from any wish that more of their brethren should come to reside within the borough. As to those aldermen who are by the charter required to discharge the duties of a justice of peace, it appears that four are constantly resident within the town, and that the fifth resides at no great distance from it; and therefore, as no delay of justice can arise from the absence of the other aldermen, it appears to me that, considering the very great inconvenience, and the quantity of litigation that may ensue, we ought not to interpose in the manner now required. Nothing but strong evidence of some serious inconvenience and injury sustained by the corporation for want of the residence of its members, can justify such an application. No case of that kind is made out; and as the resident members, who take upon themselves the whole of the duty, do not think it necessary to require the assistance of their brethren, I see no reason for our interposition.

HOLROYD, J. (a)—I entirely concur with my Lord Chief Justice. Without questioning the propriety of what is said by Mr. Justice *Ashurst* in *Rex v. Heaven*, it appears to me that there is not any injury pointed out by the affidavits in this case which has been sustained in consequence of the non-residence of the persons against whom this motion is directed. There has been no want of attendance on the part of those on whom the duty of a justice of the peace is cast. No complaint is made against them, and therefore there is no pretence for saying that public justice has been delayed, or that any inhabitants of the borough have been prejudiced. If the present application were to be granted, it would entitle any inhabitant, upon the temporary non-residence

(a) *Bayley*, J. and *Littledale*, J. were not in Court during the discussion.

of an alderman, to insist upon his amotion from office, no matter how urgent the reason might be for such temporary absence. Now, according to one of the cases in *Burrows's Reports* (a), Lord *Mansfield* says, it must be a permanent absence which is to work the forfeiture of office. If, indeed, the non-residence leads to neglect of duty, and by that neglect of duty any person is injured in any of the franchises which are given him by the charter, and such a mischief is clearly shewn, it would not only be the right, but the duty of the Court, to grant the mandamus; but it is not every temporary absence which would justify a mandamus to the mayor, to call a meeting for the purpose of considering the propriety of removing the absentee. But even before such a step could be taken, notice must be given to the non-resident to come in and defend himself; and he may shew a good ground for his non-residence, although an injury has been sustained by his absence, before he can be removed. I think the motion must lay its foundation in some injury actually sustained; or it must be shewn that some person has been deprived of some right under the charter in consequence of the non-residence; and, until that is done, the Court ought not to interfere.

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Rule discharged, but without costs.

(a) *Rex v. The Corporation of Leicester*, 4 Burr. 2089.

NESTOR v. NEWCOME and another.

Tuesday,  
 July 6.

THIS was an action for an alleged trespass in the plaintiff's dwelling-house at *Ridge* in the county of *Hertford*. The first named defendant, a magistrate, pleaded first, the general issue, and second, leave and license. The other After issue joined, and notice of trial given in action against a magistrate for an act done in his magisterial capacity, he may withdraw his plea, pay money into Court, and plead de novo.

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defendant, being a servant, pleaded that he acted under his master's orders. After issue joined, and the paper books made up, and notice of trial given for the next *Hertfordshire* assizes, *Brodrick*, on a former day, obtained a rule calling on the plaintiff to shew cause, why the defendant *Newcome* should not be at liberty to withdraw his pleas, pay money into Court under the statute 24 Geo. 2. c. 44. s. 4. by way of amends, and plead the general issue de novo.

*Chitty* shewed cause. It is a general rule, that *after* issue joined, money cannot be paid into Court. But the language of the statute 24 Geo. 2. c. 44. s. 4. is decisive. By that section of the statute, it was enacted that if the magistrate neglected to tender amends before action brought, he might, by leave of the Court, *at any time before issue joined*, pay into Court such sum as he should think fit. Without this statute, the defendant could not pay money into Court at all; and the Court will not extend a privilege, which of itself is of very considerable latitude. But the defendant does not, in the rule now moved for, specify the sum he proposes to tender. He may tender sixpence, or some trifling sum, which is no compensation to the plaintiff. At all events he is too late after issue joined, and notice of trial given.

*Brodrick*, contra. There is no general rule applicable to cases of this description. Each case must depend upon its own particular merits, and the Court, when applied to, will modify the rule as to them seems fit and proper. The case of *Devaynes v. Boys* (a) is an express authority for this application. There the C. P. held upon the statute of amends that, in an action against a magistrate, the *defendant after issue joined*, may move

(a) 7 Taunt. 33. 2 Marsh. 35. S. C.

to withdraw the general issue, pay money into Court, and plead de novo. The point was there brought under the express notice of the Court. There is no distinction between the case of a magistrate and any other person; and in ordinary cases the Court will, upon terms, allow a defendant to pay money into Court after issue joined, and even after the granting of a new trial (a).

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ABBOTT, C. J.—The case in the Common Pleas is decisive. I certainly know of no general rule which says that, after issue joined, a defendant will not be allowed to bring money into Court. This question, however, arises upon the construction of the statute of amends, and it seems to have been expressly decided in *Devaynes v. Boys*. By giving the defendant leave to pay money into Court, the plaintiff will not be prevented from going on with his action, and taking the opinion of the jury, whether the sum tendered is a sufficient compensation for the alleged trespass. The rule must specify the sum paid in, and must express that it is paid in with the leave of the Court. The officer of the Court will draw up the rule in the proper form.

HOLROYD, J. (b), and LITTLEDALE, J., concurred.

Rule absolute.

(a) See Tidd, 8th. ed. 671, 2. 2 Stra. 1271. Barnes, 289. 362. 2 Archbold. Prac. 152. 182.

(b) *Bayley*, J. was in the Bail Court.



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The KING v. The Justices of KING'S LYNN.

Where the inhabitants of a town not within a hundred, had incurred costs in defending actions brought on 57 G. 3. c. 19. s. 38, for damages done by riotous assemblies:—  
Held, that mandamus would not lie to two justices of the town, to make and levy a rate for paying the costs.

**SCARLETT** had obtained a rule calling upon two justices of *King's Lynn*, in the county of *Norfolk*, to shew cause why a writ of mandamus should not issue to them, commanding them to cause a taxation to be made and levied of the inhabitants, for paying the costs of defending certain actions brought on the statute 57 Geo. 3. c. 19. s. 38. against two of the inhabitants for the recovery of damages alleged to have been sustained by the plaintiffs in those actions, in consequence of certain riotous assemblies of persons within the borough. The affidavit upon which the rule was granted, stated that *King's Lynn* is a town *not within any hundred*, and that the costs incurred by the applicants in defending the actions in question amounted to 111*l.*; and that upon application being made to two justices of the town to levy a rate for the purpose of reimbursing the applicants, the justices declined interfering, on the ground that they had not authority to make a rate for that purpose.

*Nolan* and *Tindal* shewed cause and objected, first, that there was no provision made by any statute, authorizing a rate for the purpose of reimbursing the inhabitants of a town, not within a hundred, for expenses incurred by them in defending actions brought on the 57 Geo. 3. c. 19. s. 38; and second, that supposing this case to be provided for, the only mode of relief was by applying to the justices assembled in quarter-sessions. As to the first objection, it is manifest that the 8 Geo.

c. 16, and the 22 Geo. 2. c. 46. s. 34, which are the only statutes which provide the mode of recovering the costs of defending actions against inhabitants, are confined solely to *hundreds*, and make no mention whatever of the inhabitants of *towns*, against whom actions may be brought. Then secondly, supposing the 1 Geo. 1. c. 5. s. 6, should be relied upon on the other side, still it will be found that that statute makes no provision whatever as to the costs of *defending* actions brought against inhabitants, it merely provides a mode of reimbursing the defendants, on whom the *damages* recovered by the plaintiff have been levied; but assuming that the language of that statute is comprehensive enough to include costs as well as damages, still, in the case of a *town*, the application to tax and levy the amount should be made to the justices assembled in quarter-sessions, and not to two magistrates out of sessions. Here the application for relief has been made to two justices only, and therefore this rule cannot be supported. It is an established rule, that statutes giving costs are to be construed with strictness. *Dibben v. Cooke* (a), *Ingle v. Wordsworth* (b), *Coxe v. Bowles* (c), and *Rex v. Glastonby* (d).

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*Scarlett, Pryme, and Parke*, in support of the rule. The question must turn upon the construction which is to be put upon the 34th section of the 22 Geo. 2. c. 46. by which it is enacted, that the justices are, in the manner directed by the statute of hue and cry (8 Geo. 2. c. 16.), to cause a taxation to be made, levied, and collected, for raising and paying as well the costs and damages recovered by the plaintiff, as also all such just and necessary expenses as any inhabitant or inhabitants of the

(a) 2 Stra. 1005.

(c) 1 Salk. 205.

(b) 3 Burr. 1284.

(d) Cas. temp. Hard. 355.

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*hundred* shall have been at in defending any such action. Now although the word *town* is not here mentioned, still it must necessarily be included in the larger word *hundred*. But a town may, for the purpose of the present case, be considered as itself a hundred. That statute evidently contemplated the extension of the remedy thus provided, to all districts or places in which the inhabitants may have been compelled, by process of law, to make compensation to private individuals. A town is equally within the mischief provided for, and there can be no sensible reason for excluding the inhabitants of a town from the remedy, merely because the town happens not to be within a defined district called a hundred. This statute ought to receive a liberal construction, it being in fact a remedial statute, as the riot act, 1 Geo. 1. st. 2. c. 5. was in *Ratcliffe v. Eden* (a) held to be. If a town be within the mischief contemplated by the statute, surely it ought to be within the remedy, although not mentioned *eo nomine*. In order to give effect to the obvious intention of the legislature, the statutes 8 Geo. 2. c. 16. and 22 Geo. 2. c. 46. must be incorporated, or at least construed in *pari materia* with the 57 Geo. 3. c. 19. s. 38. by which a remedy is given against the inhabitants of any city or *town* for damage done by riotous or tumultuous assemblies, "if such city or town be a county of itself, or is not *within any hundred*, or otherwise, the inhabitants of the hundred in which such damage shall be done," &c. Unless a liberal construction is put upon these statutes, the inhabitants of towns will be deprived of that remedy which was evidently intended to be given to all divisions of counties, whether hundreds, or towns not within a hundred (b).

(a) Cowp. 485. Sec Doug. 699.

(b) See 2 Inst. 110 & 150.

The COURT took time to advise upon the case, and judgment was now delivered by


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ABBOTT, C. J.—This was a motion for a writ of mandamus to be directed to two justices of the borough of *King's Lynn*, commanding them to make a rate, and levy a sum of money, for the purpose of reimbursing two inhabitants of the town, the costs incurred by them in defending actions brought against them on the statute 57 Geo. 3. c. 19. s. 38. for recovering damages occasioned by riotous assemblies. It appears that *King's Lynn* is a town corporate, that it is not within any hundred, and that it is not a county of itself. On shewing cause against the rule nisi for a mandamus, two objections were made; first, that this case was not in any manner provided for by any statute; and second, that if it was in any manner provided for, the mode of relief was by application to the quarter-sessions, and not to two justices out of sessions. The 38th section of the statute 57 Geo. 3. c. 19. on which the actions were brought, is as follows: “And be it further enacted, that in every case where any house, shop, or other building whatever, or any part thereof, shall be destroyed, or shall be in any manner damaged or injured, or where any fixtures thereto attached, or any furniture, goods, or commodities whatever, which shall be therein, shall be destroyed, taken away, or damaged by the act or acts of any riotous or tumultuous assembly of persons, or by the act or acts of any person or persons engaged in or making part of such riotous or tumultuous assembly, the inhabitants of the city or town in which such house, shop, or buildings shall be situate, if such city or town be a county of itself, or is not within any hundred, or otherwise, the inhabitants of the hundred in which such damage shall be done, shall be liable to yield full compensation in damages to the person

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or persons injured or damnified by such destruction, taking away, or damage; and such damages shall and may be demanded, sued for and recovered by the same means, and under the same provisions, as are provided in and by the 1 Geo. 1. st. 2. c. 5. with respect to persons injured and damnified by the demolishing or pulling down of any dwelling-house, by persons unlawfully, riotously, and tumultuously assembled." It is to be remarked, that this statute speaks only of the *damage* sustained by the party injured, and is silent as to the *costs of a defence*. The statute 1 Geo. 1. st. 2. c. 5. also mentions only the *damages* to be recovered by the plaintiff, and directs that at the plaintiff's request, made to the justices of the town, *at any quarter-sessions*, the damages shall be raised and levied on the inhabitants of the town, and paid to the plaintiff in the manner directed by the 27 Eliz. for reimbursing the persons on whom money recovered against any hundred, by any party robbed, shall be levied. The 27 Eliz. c. 13. ss. 4 & 5. provides only for relief of the particular inhabitants of a hundred upon whom the damages recovered against the hundred may have been levied, and directs that upon complaint made by the parties so charged, two justices of the county shall tax the hundred. This statute, therefore, has made no provision for the *costs of the defence*. It is confined to *hundreds*, and though it gives the power to two justices, and is referred to by the 1 Geo. 1. st. 2. c. 5. yet by the express words of that statute, the power is given to the *quarter-sessions* in the case of a *town*. So that unless there be some other statute that can be embodied into and made a part of the legislative provision of the 57 Geo. 3. there is clearly no foundation for this application for a mandamus. It was argued in support of the motion that the statutes 3 Geo. 2. c. 16. and 22 Geo. 2. c. 46. are so to be considered. Now with re-

spect to the 8 *Geo.* 2. c. 16. that relates only to the statutes of hue and cry. It directs that in actions against the hundred, the process shall be served on the high constable, who is to defend, and if the plaintiff obtains judgment, the sheriff is to produce the writ of execution to *two justices* of the county, who are to make an assessment as directed by the 27 *Eliz.* c. 13. and are to include therein, in addition to the damages and costs recovered by the plaintiff, the necessary expenses of the high constable in defending the action. This is the first time that any act has mentioned or made provision for the recovery of *costs* in *defending* the action. The 22 *Geo.* 2. c. 46. s. 34. extends the remedy given by the statute 8 *Geo.* 2. (which, as already observed, is confined to the statutes of hue and cry,) to all causes or actions against the inhabitants of any *hundred*, and directs the sheriff to produce the writ of execution to two justices of the peace of the county as directed by the statute 8 *Geo.* 2. and thereupon requires the justices to raise by taxation as well the costs and damages recovered, as the expenses incurred by any inhabitant *in defending* the action. These are the only statutes upon the subject, and of these the only one mentioning the inhabitants of a *town* is the 1 *Geo.* 1. st. 2. c. 5. and this makes a distinction between the inhabitants of a hundred and those of a town; and as to the first directs the assessment to be according to the 27 *Eliz.* namely, by two justices of the county; as to the latter, that is, the inhabitants of a town, it gives the authority to the justices at quarter-sessions. If, therefore, we were to grant the writ in the present case, we should be granting relief for costs to a defendant in a case in which no statute has, in terms, given such relief, and should also be ordering the relief to be administered by two justices, when the only statute providing for the case of a town has given the power of relieving

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to the justices assembled at quarter-sessions. To do this would be ordaining and making a new law, which we have as little inclination as authority to do. The rule, therefore, must be discharged.

Rule discharged.

*Wednesday,*  
*July 7.*

HARRISON and another v. WILLIAMS.

A resident inhabitant of a town corporate has a right to inspect and take copies of a by-law of the corporation, pending an action against him for a breach of the same, although he is not a corporator; and mandamus will lie for this purpose.


*CHITTY* on a former day obtained a rule calling on the Corporation of the City of *Chester* to shew cause why a mandamus should not issue directed to them, commanding them to permit the defendant to inspect the corporation books, for the purpose of seeing and taking a copy of the by-law for the violation of which this action was brought. It was an action of debt by the treasurers of the corporation, to recover penalties against the defendant for exercising the trade of a tanner within the city, contrary to a by-law of the corporation, which forbids persons carrying on trades within the city who are not freemen thereof. The motion was made on the authority of *The Brewers' Company v. Benson (a)*.

*D. F. Jones* now shewed cause. The defendant not being a member of the corporation has no right to inspect its books. He is to all intents and purposes a stranger and a foreigner, and, therefore, the Court has no authority to compel the corporation to submit its books to his inspection. The case of *The Brewers' Company v. Benson* has been virtually overruled by subsequent decisions; *Talbot v. Villebois (b)*, and *Hodges v. Atkis (c)*. But in the *Mayor of Southampton v. Graves (d)*, in which

(a) Barnes, 236.  
(c) 3 Wils. 398.

(b) 3 T. R. 142. in which it is cited.  
(d) 8 T. R. 590.

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all the authorities upon this subject were fully considered, it was expressly held, that pending an action by a corporation for tolls, the Court will not grant leave to inspect the corporation muniments on application of the defendant, a stranger to the corporation. Though the action in that case was for tolls, still the principle of the decision is applicable to this, because here the defendant, a stranger, is seeking to inspect the corporation muniments. The decisions in later times have allowed this advantage to corporators, who may be supposed to have an interest in the proceedings of the corporation; but it would be an anomaly if a perfect stranger were allowed such a privilege. Whatever a court of equity may do, it seems clear that a court of law has no power to order such an inspection. In the case last referred to, Lord *Kenyon* said, “ Lord *Hardwicke* (a), who perfectly well understood the boundaries between the courts of law and equity, expressly said, that courts of law cannot grant such an inspection as is prayed for in this case, though a court of equity can; but then a court of equity will only do it in certain cases, after examining into the circumstances of the case.” The same learned judge illustrates the injustice of the principle by putting this case: “ Suppose an application of this kind were granted in a court of law against a purchaser of an estate for a valuable consideration without notice of some prior estate, the defect is disclosed to the adverse party, who gets possession of the prior deeds and then defeats such purchaser at law.” Corporations, like individuals, have their rights and estates, and there is no more reason for compelling a corporation to exhibit its muniments to an adverse party, than there is for compelling a private individual to exhibit his title deeds. But in point of fact, there can be no necessity in this case for an inspection of

(a) 2 Ves. 620.



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the by-law in question, because it will be a necessary part of the plaintiff's case to produce it in evidence on the trial, and then the defendant will have abundant opportunity of knowing what he is called upon to answer. He has no more right beforehand to see the by-law than he would have to see the title deeds of a plaintiff suing in his individual character. At all events this application is premature, because the affidavit upon which the rule nisi was founded, does not shew any application, and refusal, to see the by-law, which is necessary before the defendant can come to the Court to require a compulsory inspection.

*Chitty, contra.* This case is perfectly distinguishable from *The Mayor of Southampton v. Graves*, which was an action against the defendant for certain tolls for wharfage on landing goods. Here the action is founded on a by-law which affects all the inhabitants and residents of the city of *Chester* at large, and that was the ground of the decision in *The Brewers' Company v. Benson*. If the defendant is to be sued in penalties for violating a by-law of the corporation, he has at least a right to know by what authority, and upon what principle it is founded. This application is justified upon public grounds, and does not seem to affect the rights of property with which the corporation may be invested. It is perfectly distinguishable from the case of a defendant desiring to inspect the title deeds of a plaintiff, which affect his private and individual rights. The case in *Burnes* has never been overruled, and on the authority of what is there said this rule must be made absolute.

ABBOTT, C. J.—I certainly do not find that the decision in *The Brewers' Company v. Benson* has been overruled. That was an action on by-laws of the com-

pany against the defendant for exercising the trade of a brewer, he not being a member of the company, and the decision seems to have proceeded on the ground that "by-laws affecting strangers interest them therein," and the Court made the rule absolute for the defendant to inspect the company's books and take copies of the by-laws. There is a very intelligible and sensible distinction between a case where a plaintiff is claiming tolls, which may depend upon private rights, &c. and that where a corporation is suing upon a by-law, which may affect all the inhabitants of a place, and on that ground I think the case of the *Mayor of Southampton v. Graves* is mainly different from this. I fully agree with what Lord *Kenyon* says, that a claim to tolls is like a claim to land or any other estate, and that a court of law cannot compel a person to shew the title deeds of his estate, and that in that respect there is no difference between a corporation and a private individual. But this case is totally different. The party against whom the action is brought is not altogether a stranger in the corporation, for he is living in a place in which he is under their rule and government, and if an action is founded upon a supposed law laid down for the government of the city, he cannot by any means be said to be a stranger, (though not a corporator,) with reference to the law by which he is to be affected. I think the case cited from *Barnes* is founded in good sense and reason, and I know of no case in which it has been overruled. This by-law is, I apprehend, made for the government of *all* residents in the city, and as the corporation have brought an action for its violation, I think it is reasonable that the defendant should have an inspection of such of their books as will shew him what is the law of the place in which he is living. As to the objection that the defendant has not made any demand, I think this is a case in which a de-

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mand may be dispensed with, for this application shews that it would have been fruitless.

BAYLEY, J.—Every man has a right to trade in any place, unless the right is taken away by custom or by law, and he has a right, though not a corporator, to inspect the corporation books for the purpose of seeing what the law is, which he is charged with having violated.

HOLROYD, J. and LITTLEDALE, J. concurred.

The COURT made the rule absolute for a peremptory mandamus to the corporation to allow the defendant or his attorney to inspect such of the corporation books as related to the matter in question in *this cause*, and that the town-clerk should give copies of the by-laws to the defendant, the latter paying the expense of such copies, and also paying the town-clerk for his attendance.

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The KING v. J. MIDDLETON.


The driver of a stage van travelling to and from *London* to *York* is a common carrier within the meaning of the 3 Car. 1. c. 1. and subject to the penalties thereof, for travelling on *Sunday*.

THE defendant having been convicted and fined 20s. by two justices for the Borough of *Stamford* in *Lincolnshire*, as a carrier, for driving a *van* on a *Sunday*, contrary to the statute 3 Car. 1. c. 1. "An act for the further reformation of sundry abuses committed on the Lord's day, commonly called *Sunday*" (a),

*D. F. Jones* moved for a writ of certiorari to remove the conviction into this Court, for the purpose of being quashed for insufficiency. The defendant, as the mere driver of a van travelling to and from *London* to *York*, is

(a) See 1 Car. 1. c. 1. 29 Car. 2. c. 7. and 10 & 11 W. 3. c. 24. s. 14.

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not a carrier within the intent and meaning of the statute. That statute ought to be construed most strictly, especially in modern times, when the necessities and convenience of commerce require a free and uninterrupted communication between different parts of the kingdom. The object of the statute must be taken to have been to prevent the wanton and idle violation of the decorum of the Sabbath day, and not to obstruct the free intercourse between the metropolis and the distant provinces of the country. Now, a *van* is not one of the carriages mentioned in the statute, and if not, then according to the acknowledged rule by which penal acts of parliament are to be construed this conviction cannot stand. The statute enacts, "That no carrier with any horse or horses, nor waggon-men with any waggon or waggons, nor carman with any cart or carts, nor wainman with any wain or wains, nor drover with any cattle, shall travel upon the said day, upon pain that every person and persons so offending shall lose and forfeit twenty shillings for every such offence." It would be highly inconvenient to the public, if in these times, this statute were to be strictly enforced. Undoubtedly, the defendant, as the servant of a carrier, is within the mischief of the act, if his van falls under the description of carriages therein enumerated; but by the same rule of construction the drivers of the royal mail coaches, and of every description of stage coach, which happened to ply and carry parcels and passengers on *Sunday* for hire, would, as common carriers, be subjected to the penalties of the statute at every place through which they happened to pass.

ABBOTT, C. J.—We are not called upon to give any opinion whether the drivers of mail and stage coaches are carriers within the purview of this statute; but we have no doubt whatever, that the driver of a *van* is a

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carrier within the intent and meaning, if not the very terms of this statute, which has for its object the due observance of the Sabbath day, and therefore ought to receive a liberal construction.

BAYLEY, J. and HOLROYD, J. concurred.

Rule refused.



Wednesday,  
July 7.

The KING v. The Lord of the Manor of BONSALL, and the Steward of the said Manor.

Tenants in coparcenery of a copyhold estate are in law but one heir; and it seems that they are entitled to admittance upon the payment of one fine to the lord, and one set of fees to the steward of the manor.

ON shewing cause against a rule nisi for a mandamus to be directed to the lord of the manor of *Bonsall* in the county of *Derby*, and to *A. Wolley*, the steward of the said manor, commanding them to admit *R. Ward*, or the co-parceners and heirs of *S. Richardson*, deceased, to a copyhold close, or parcel of land, consisting of about six acres and a half, situate, lying, and being within the said manor, and which had been duly surrendered to the use of the said *S. Richardson* and his heirs, according to the custom of the manor, the case on affidavit was this:—  
*S. Richardson*, after having made his will, purchased the copyhold estate in question, in 1818, and duly surrendered the same to the use of himself and his heirs for ever, and died on the 20th *January*, 1823, without altering his will. He left his daughters, *Catherine Richardson* and her three sisters, his co-heiresses at law, and they became entitled to the copyhold estate in question, which was subject to a lord's fine of two shillings. It appeared, that before *S. Richardson* had purchased the estate, it had been held as two separate and distinct copyhold tenements, by two persons, as tenants in common, although he had been admitted to them as one ten-

and her co-heiresses having  
the applicant, they  
rt-baron, when  
mitted separately  
in common to two  
of fees from each,  
whole to the sum of  
ed to pay, but tendered  
sets of fees for the whole, as  
se circumstances *R. Ward* ap-  
in order to perfect his title, and  
whether the steward was not bound to  
ceners as one heir, upon the payment  
es.

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, *A. G.* and *N. R. Clarke* shewed cause. The  
question in this case is, whether there is any sub-  
stantial difference, as with respect to copyhold estates,  
between tenants in co-parcenary and tenants in common.  
Parceners hold their estates in severalty, and there being  
no right of survivorship, their shares descend to their  
heirs severally and respectively, and therefore the lord  
and his steward have a right to demand sets of fees from  
each. If this be not the case the lord might never have  
a fine, because, possibly there would be always a tenant  
living; inasmuch as the heir of a co-parcener becomes a  
co-parcener with the survivors. It may be conceded,  
that for some purposes co-parceners are considered as but  
one heir, but that is not so with respect to copyholds:  
the moment it is established that they have several inte-  
rests, as they undoubtedly have here in point of legal  
effect, that moment the lord becomes entitled to several  
sets of fines. If the interests of tenants in common in a  
copyhold are distinct, and a separate fine is payable by  
each, the same reason applies to co-parceners, in order

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that the lord may not be prejudiced in his manorial rights. There certainly is no case to be found in which this question has been brought before the Court, but upon principle and analogy it seems clear that the consequence pointed out follows as of course. At all events, the estate in question must be considered as two tenements, and therefore there are at least two sets of fees payable. The estate formerly consisted of two separate tenements, and though they may be now united into one tenement, still, according to *Attree v. Scott* (a), the multiplication of fees continues. But *Rex v. Rennett* (b) shews, that a copyholder who claims by descent cannot have a mandamus to the lord to admit him; his proper remedy is in Chancery. *Lit. s. 66, 67. Cro. Jac. 368. 1 Rol. Abr. 108.*

*Campbell*, contra. Here the co-parceners constitute in point of law but one tenant and one heir, and consequently are entitled to be admitted upon the payment of one fine to the lord, and one fee to the steward (c). In point of fact, two sets of fees were tendered, which is double what the steward was entitled to demand, for upon the authority of *Garland v. Jekyll* (d), the testator, *S. Richardson*, having been admitted to the whole estate as one tenement, the steward had no right afterwards to consider it as two. [Here the Court stopped him.]

ABBOTT, C. J.—If an heir applies to the Court for a mandamus with a view to try the title to a copyhold tenement as against a stranger, the Court may refuse the writ on his behalf, for as respects the stranger he has no

(a) 6 East, 476.

(b) 2 T. R. 197.

(c) See Watkins on Copyholds, 277, 8. 3 T. R. 165, 2 Plow. 614. and 9 Mod. 62.

(d) 7 J. B. Moore. 2 Bing. 273. S. C.

title, but the bare admittance and the payment of the fine to the lord (a). But when the application for a mandamus is where there is no dispute between the heir at law and a stranger, then the case stands on a different footing. Here there is no dispute between the heir at law and any other persons; and the title of the co-parceners is out of the question. I have no doubt in the present state of things, that for the purpose of taking the inheritance the co-parceners form but one heir, and that they are entitled to be admitted as one heir, but I am not so clear whether more than one fine, or more than one set of fees, can or cannot be taken upon their surrender or their admittance. The present inclination of my opinion is, that they may make a joint surrender upon the payment of one fine and one set of fees. It is laid down, that co-parceners may join in a demise, and if they may do that, I do not see why they may not join in a surrender, and be liable only to one set of fees. Upon that point, however, I wish to give no opinion with the same confidence that I do upon the other. The proper course will be to direct a mandamus to issue commanding the lord and his steward to admit the persons applying, and to accept their surrender, paying the *lawful* fees. If the lord or his steward shall hereafter wish to have the further opinion of the Court upon the point whether more than one set of fees may be lawfully demanded, it will be competent for them to do so, by making a return to the mandamus.

BAYLEY, J.—I have no doubt as to the propriety of granting a mandamus, for this is not merely the application of the heir, but of the person to whom the heir is desirous of conveying the estate; and therefore he has a right to

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(a) See *Rex v. The Brewers' Company*, ante, 307.



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clothe himself with the legal title, in order that he may stand in the relation of tenant and convey it to others. Upon the subject of the fees to be paid, I own, that as at present advised, I think the co-parceners are entitled to be admitted upon the payment of one fine to the lord, and one set of fees to the steward upon admittance; because the law considers them as constituting one entire heir. The inheritance descends entirely to all the co-parceners, and remains entire in them until they make a severance. If they afterwards make a severance, then they will convey in distinct parts; but if, instead of severing and conveying in parts, they all join in conveying to the same party, it seems to me there ought to be but one fine payable to the lord, and one set of fees payable to the steward; and then that mischief which, with reference to copyhold estates, is considered as existing, will be prevented: for it has been considered till lately, as a doubtful point, whether, when there has been once a severance and disunion of the estate, that would take away from the lord the right to different heriots, and from the steward the right to distinct fees. But in the case of an inheritance descending entire, and continuing entire until some act is done to sever it, I think the act of all the co-parceners in conveying the estate has not the effect of severing it; but that it passes from them as an entire estate, and consequently but one set of fees is payable.

**HOLROYD, J.**—At present the co-parceners have the unity of the estate in them, and they may pass it from them either by a joint conveyance or a joint demise; and that being the case, the law considers them as one heir. In the case of freehold, co-parceners may be tenants to one præcipe, because they have the unity of the estate in them. The same principle applies in the case

of copyhold. At present the unity of estate being in these co-parceners, I think there should be but one fine, and for the same reason it seems to me that the steward would be entitled to one set of fees only upon the admission of the different persons constituting one tenant.

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LITLEDALE, J.—I am of opinion that an heir is entitled to a mandamus to admit in the case mentioned by my Lord Chief Justice. Here it is of importance to the purchaser of the estate, to know that he has a good title from the heir, and for that purpose it is necessary that the heir should be admitted. I also think that these co-parceners are in law but one heir, and are entitled to be admitted as one heir. Whilst the estate is united in them, co-parceners may join in one surrender. They may join in one avowry, and so in a surrender; and if so, why may they not be admitted upon the payment of one fine to the lord, and one set of fees to the steward? I really see no reason why they may not.

Rule absolute.

SIR WILLIAM CURTIS, Bart. and another, v. The Inhabitants of the Hundred of GODLEY.

DEBT, on the statute 9 G. 1. c. 22., against the defendants, inhabitants of the Hundred of *Godley*, in the county of *Surrey*, to recover damages for an injury sustained by the plaintiffs, in having had a quantity of fir trees, growing for profit, wilfully, maliciously, and feloniously destroyed a plantation of trees by fire, unless the act done proceeds from a malicious motive towards the owner of the property. Therefore, where a fire, supposed to have been wilfully made, had commenced in another person's plantation at the distance of a mile from the plaintiff's wood, and by communication the flames destroyed his property:—Held, that the case did not come within the Black Act, so as to entitle him to sue the hundred.

An action will not lie against the hundred upon the 9 G. 1. c. 22. for the unlawful and malicious destruction of

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by fire by some person or persons unknown. Plea, the general issue, and issue thereon. At the trial before *Alexander, C. B.* at the last *Lent Assizes* for the county of *Surrey*, the evidence in support of the action was this:—On the 6th *May*, 1823, a large plantation of firs, growing on Bagshot Heath, belonging to the plaintiffs, and which was situate at a distance of a mile from any dwelling house, was destroyed by fire. The fire first broke out in the day-time, in an adjoining plantation, belonging to a Mr. *Laurel*, and burned through that plantation for the length of a mile, previous to its communicating to the plantation of the plaintiffs. The spot where the fire was first seen was distant half a mile from any dwelling house, and from any public road, and near it were found some remains of sear wood, which appeared to have been collected and used for the purpose of kindling a fire. Upon this evidence, it was contended that there was no case to go to the jury, from which they could presume that the fire was wilfully and maliciously kindled. The probability was, that the fire was either accidental, or occasioned by some mischievous boys, in which case the hundred would not be answerable. Two objections, after mentioned, were also taken as to the liability of the hundred in point of law for the injury in question, supposing it to have been wilful and malicious. The Lord Chief Baron reserved those points, with liberty to the defendant to move to enter a nonsuit, in the event of a verdict being found for the plaintiffs; and his lordship then directed the jury to find for the plaintiffs, if they were satisfied that the fire had been kindled wilfully and maliciously, but, if they thought it arose from accident, to find for the defendants. The jury found for the defendants.

*Marryat*, in *Easter Term* last, obtained a rule for a

new trial, on the ground that the verdict was contrary to the evidence.

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*Bolland* shewed cause. The jury were, upon the evidence, justified in finding that this was an accidental and not a wilful and malicious fire. There was no proof to satisfy the averment in the declaration, that the plantation was wilfully, maliciously, and feloniously destroyed. The hundred is not liable for accidents arising from the wantonness of boys, or the carelessness of wayfaring persons, who may happen to kindle a fire for culinary purposes, in an open place like *Bagshot Heath*. Some satisfactory evidence was necessary to shew that the fire was occasioned by the commission of a felonious act. Positive evidence to that intent may not be necessary, but some cogent proof of an unlawful intention must be adduced, so as to subject the hundred to liability. Here the evidence was too slight, and the jury did right in finding for the defendants. But there are two fatal objections to the plaintiffs' right to recover against the hundred in point of law. First, that the wilful destruction of a plantation of trees of this description by *fire* is no offence within the Black Act, 9 G. 1. c. 22. upon which the action is founded; and second, that if it be an offence to destroy trees of this description, the remedy given by law is against the parish, town, or vill, and not against the hundred. As to the first objection, it is fatal in two points of view. The words of the Black Act are that "if any person or persons shall unlawfully and maliciously kill, maim, or wound any cattle, or cut down, or otherwise destroy, any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit, &c." Now to destroy trees by *fire* is no offence within this act, because the words "or otherwise destroy," must mean a destruction ejusdem generis with

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“cutting down.” Then it is obvious from the language of the statute, that the trees must be such as are growing *contiguous to a dwelling house*, which was not the case in this instance. Secondly, the action, if at all maintainable, must be laid against the *parish, town, or vill*, according to the provisions of the statutes 1 Geo. 1. c. 2. and 6 Geo. 1. c. 16. It is true that the 22 Geo. 1. c. 36. s. 8. gives an action against the inhabitants of the hundred, or of the parish, town, or vill, at the option of the party injured; but this is only in those cases where the act done would be an offence within the 9 Geo. 1. c. 22. Here the act done is not an offence within that statute, and, therefore, the hundred is clearly not liable.

*Marryatt and Chitty*, in support of the rule. In order to maintain an action against the hundred, it is not necessary to give distinct and positive evidence, that the injury was done wilfully and maliciously. It is sufficient to adduce such evidence as may reasonably induce the jury to believe that it did not arise from accidental causes. *Reed v. The Inhabitants of Gainsbury(a)*. Such evidence was here given, and, therefore, the verdict is erroneous. Then as to the objections that this is not an offence within the meaning of the Black Act, and that if it be a malicious injury the remedy must be against the parish, town, or vill; they arise from too narrow a construction of the statute in the first instance, and from a misapprehension of the law in the other. The words “otherwise destroy,” in the Black Act, mean a destruction by any mode whatever, and cannot be construed to mean a destruction by cutting only. To maintain that interpretation of the statute, it must be said, that to burn down a plantation of 150 acres of trees would not be to destroy them; but this would be too narrow a construction of

(a) Ante, 198.


remedial statute, which this has been decided to be. Then was this a plantation within the meaning of the statute? The words are "any trees planted in any avenue, or growing in any garden, orchard, or *plantation*, for ornament, shelter, or *profit*." Now this was a plantation of trees growing for profit, and clearly comes within the words of the statute. If it did not, there would be no protection given by the law to this species of property, which is of great importance as it respects the useful application of waste land, which could be applied to no other purposes. This, therefore, being a case within the Black Act, the hundred is liable, and the plaintiffs were not bound to proceed against the parish, town, or vill.

BAYLEY, J.—The verdict for the defendants must have proceeded on the ground that there was no evidence to convince the minds of the jury that this plantation was wilfully set on fire. I take it to be quite clear that a plaintiff bringing an action on the 9 Geo. 1. c. 22. must make out to the satisfaction of the jury that the place was wilfully set on fire before he can recover against the hundred. If this case should go to a new trial the proper direction to the jury would be, that if they are convinced, in their own minds, by the evidence, that the plantation was wilfully set on fire, then they ought to find for the plaintiffs; but if upon a review of the whole evidence, considering the time of day when the fire occurred, the situation of the place, and its liability to accidental fire, they should entertain a reasonable degree of doubt, then they ought to find for the defendants. Upon the balance of the evidence, it seems to me that it would not be improper, that the case should, upon payment of costs, undergo the revision of another jury, provided, upon carefully looking through the acts of parliament, we should be satisfied that this is a case to which the 9 Geo. 1. c. 22.

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applies; and it being a question of great and general importance we shall take time to consider of it.

Cur. adv. vult.


On a subsequent day the judgment of the Court was delivered by

BAYLEY, J.—We have looked into the different acts of parliament bearing on this case, and we are of opinion, that this action is not maintainable against the hundred; but our judgment is founded upon a view of the 9 Geo. 1. which was not brought to our notice during the argument. The question is, whether the destruction of this plantation by fire, assuming it to have been done wilfully, would be any offence within the meaning of that statute, so as to give a remedy against the hundred; and we are of opinion that it would not. Before I state the reasons for that conclusion, I shall advert to the other statutes referred to in argument, as giving a remedy against the inhabitants of the parish, town, or vill. The 1 Geo. 1. st. 2. c. 48. entitled “An act to encourage the planting of timber trees, fruit trees, and other trees, for ornament, shelter, or profit; and for the better preservation of the same; and for the preventing the burning of woods;” enacts that if any person shall maliciously break down, cut up, pluck up, throw down, bark, or otherwise destroy, deface, or spoil, any timber tree, fruit tree, or any other tree, the party injured shall recover satisfaction and recompense from the inhabitants of the parish, town, hamlet, vill, or place, where the injury shall have been committed. The 6 Geo. 1. c. 16. recites that doubts had arisen whether the previous act extended to offences committed in the day time, and gives a remedy against the inhabitants of the parish, town, &c. adjoining the wood, &c. whether the damage be done by day or by night. The 29 Geo. 2.

c. 36. s. 9. recites, that by the 9 Geo. 1. c. 22. it was enacted that the inhabitants of the hundred should make satisfaction and amends to every person for damage sustained by the cutting down or destroying any trees, which should be done or committed by any offender against that act, to be recovered in manner therein directed; and recites also that doubts had arisen whether the provision made by that act had not repealed and annulled the remedy given by the 1 and the 6 Geo. 1. respectively; and for obviating such doubts, proceeds to enact, that “it shall and may be lawful for any person, &c. to take remedy for the before mentioned damages, either against the parish, town, hamlet, vill, or place, where any of the *said offences* shall be committed, according to the powers given by the said acts, or on the hundred wherein any of the *said offences* shall be committed, as to such person, &c. shall seem most meet.” It is obvious that the words “*said offences*,” refer to the offences created by the 9 Geo. 1. c. 22. The 13 Geo. 3. and subsequent statutes give no remedy against the hundred; and, therefore, these acts give the remedy against the inhabitants of the parish, town, or vill. The remedy against the hundred being given by the 9 Geo. 1. c. 22. only, and the 29 Geo. 3. c. 36. giving an option to the party injured to bring his action either against the parish, &c. in cases where the person doing the act is an offender against the Black Act, the question for our consideration is whether the person or persons who did the act, whereby the plaintiffs in this case have been damnified, were offenders against that statute. The words of the 9 Geo. 1. c. 22. s. 1. are, that if any person “shall unlawfully and maliciously kill, maim, or wound any cattle, or cut down, or otherwise destroy, any trees planted in any avenue or growing in any garden, orchard, or plantation, for ornament, shelter, or profit, he shall, upon conviction, be adjudged guilty of

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felony." Now, in order to constitute an offence within this clause, it is essential that the act should be done unlawfully and maliciously; and the term "maliciously," in this part of the statute, means, according to a great many decided cases, *malice against the owner* of the property injured. I shall advert to some cases in which this construction was put upon both branches of this part of the clause. In *Rex v. Pearce*, tried before Mr. Justice Heath, at Gloucester, in 1789, and in *Rex v. Kean*, at the Old Bailey, in the same year, it was ruled, that in order to support an indictment for maiming cattle it was necessary to shew that the act was done from malice against the owner of the cattle, and not from any angry or passionate disposition towards the animal itself. In *Shepherd's case (a)*, the same point was ruled by Mr. Baron Hotham and Mr. Justice Heath; and in all these cases the prisoners were acquitted. There have, however, been later decisions than those I have mentioned. In *Rex v. Austin*, which was determined before the twelve Judges in Michaelmas Term, 1822, the same point was decided. In that case, the prisoner was indicted for killing, maiming, and wounding a sheep of one *Mary Clare*. It appeared in evidence that the prisoner acted from malice, not against *Mary Clare*, but against *Joseph* her son, who managed the business of her farm: after conviction the twelve Judges held, that the conviction could not be supported, inasmuch as *Joseph Clare* could not in any respect be considered as owner of the sheep. These decisions took place on the first branch of the clause as to the maiming of cattle; but the words "unlawfully and maliciously" are referable to both branches of it, and must receive the like construction. Mr. East, in his Pleas of the Crown (b), comments on this statute, and also upon the 6 Geo. 3. c. 36. and c. 48., and after no-

(a) 2 Leach, 609.

(b) 2 East, P. C. 1062.

ting several points in which they differ, makes these observations :—" the most important distinction of all, is the view and intent of the Black Act contrasted with the other statutes. Supposing that the words " wilfully and maliciously," which occur in the preamble of the statute 6 Geo. 3. c. 36. of which the first only is used in the enacting part of the 6 Geo. 3. c. 48. are a descriptive part of the offence under those statutes, yet the whole scope of those statutes, which were intended for the protection of the property itself from depredation, shews that the word " maliciously" is only to be taken in its most general signification, as denoting an unlawful and bad act, an act done malo animo, from an unjust desire of gain, or a careless indifference of mischief. Whereas, in order to bring an offender within the penalty of death under the Black Act, the malice must be personal against the owner of the property. This has been expressly holden with respect to the offence of killing, maiming, or wounding cattle, and the two offences are described in the same paragraph of the clause, and must therefore have the same construction." Since the publication of Mr. East's work, the question upon the latter branch of the clause has come under the consideration of the Judges in *Rex v. Taylor*, in Hilary Term, 1819. There a person named *Knevett*, a nurseryman in the county of *Surrey*, had many young apple and pear trees growing in his garden, from four to six feet high. It appeared that the prisoner, acting from malice towards *Knevett*, cut down about 100 of the trees, and left them on the ground. Several of them were cut below the grass, and might shoot again and be regrafted, and would bear again in five or six years. It was found by the jury as a fact that although the trees were cut down, yet they were not totally destroyed, and upon this finding the Judges were unanimously of opinion that these were trees within the

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act, inasmuch as they were growing for profit, and that cutting them down, without total destruction, was sufficient to bring the case within its operation; and they held that the 9 Geo. 1. c. 22. was not repealed by the 6 Geo. 3. c. 36. and c. 38. because those statutes applied to cases where there was no malice against the owner of the property, and they determined the conviction to be right. In that case it was also made a question whether the destruction of trees in gardens, orchards, and plantations, continued an offence under the 9 Geo. 1. c. 22. notwithstanding the subsequent provisions in the 6 Geo. 3. c. 36. and c. 48. and the Judges were of opinion that it did, because to bring a case within the Black Act, malice against the owner of the trees was essential, whereas the other statutes applied to cases where no such malice existed. In order therefore to enable a party to maintain an action against the hundred, under the Black Act, for the destruction of trees, it ought to appear that the offender acted from malice against the owner. Now the facts in this case clearly take it out of the statute in that view. Here it appears, that the fire was kindled, not upon the plaintiff's ground, and if kindled at all by design, it was upon the land of Mr. *Laurel*, at a considerable distance from the plaintiff's property, and therefore we think that although there might be some reason for saying that the offender acted from malice towards Mr. *Laurel*, yet it cannot with propriety be said that he acted from malice against the plaintiff, and consequently this action is not maintainable against the hundred, the offence, if any, not being within the 9 Geo. 1. c. 22. It follows, therefore, that the rule nisi for a new trial must be discharged.

Rule discharged.

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ROGERS v. JONES, Esq.

Monday,
8th Nov.

TRESPASS for false imprisonment against a magistrate of the county of *Cardigan*. Plea, not guilty, and issue thereon. At the trial before *Park, J.* at the last *Summer Assizes* for the county of *Hereford*, in order to support the plaintiff's case, a commitment under which the imprisonment took place, signed by the defendant, was put in and read. It recited that a certain quantity of wood, the property of *T. D.* had been cut and spoiled, and taken and carried away, and that he, the said *T. D.* had just cause to suspect that the plaintiff did cut and spoil and carry away the same, and that two ashen trees were found on plaintiff's premises, and that he could not give any satisfactory account how he came by the same, and, therefore, that he, defendant, convicted plaintiff of cutting, spoiling, taking and carrying away wood, the property of *T. D.*, whereupon, he, defendant, ordered plaintiff, within the space of twenty-five days then next ensuing, to pay to the said *T. D.* eleven shillings in satisfaction of the damage done, and also ordered the plaintiff within the space of twenty-five days to pay to the overseers of the parish in which the offence was committed, for the use of the poor, the sum of 20*l.* and in default of complying with the said order, he, plaintiff, was committed for disobeying the same. Under this commitment the constable took the plaintiff into custody and carried him to the house of correction, where he was detained until he conformed to the order. This commitment was supposed to be founded on the old statute 15 *Car. 2. c. 2.* In answer to the alleged false imprisonment the defendant gave in evidence a formal conviction founded upon the had been quashed. *Sed quere* whether admissible in mitigation of damages.

Where a magistrate committed a party to prison for an alleged offence against one statute, and afterwards drew up a conviction for a different offence from that stated in the commitment:—Held, that the conviction was no justification of the magistrate in an action against him for false imprisonment. Held also that the 43 *G. 3. c. 141. s. 2.* which deprives a plaintiff of his costs of suit against a magistrate, if the latter proves at the trial that the plaintiff was guilty of the offence imputed, only applies to cases where the conviction has been quashed, and, therefore, such evidence was inadmissible, it not appearing that the conviction

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statute 6 *Geo.* 3. c. 48. which stated that the plaintiff had been convicted on that statute, for that he, on, &c. did go into the wood grounds belonging to *T. D.* of, &c. and did cut, spoil, and feloniously carry away two ash trees of the said *T. D.* not having the consent of the said *T. D.*, the owner of the said woods, nor of any other person, entrusted with the care thereof, for which offence the plaintiff was ordered to pay the penalty of 20*l.*, together with the sum of 5*l.* 6*s.* for the charges and expenses attending the said conviction, this being the first offence. It was contended that this being a regular conviction drawn up conformably to the statute, was evidence of all the facts alleged in it, and a complete justification of the defendant, for which the case of *Gray v. Cookson* (a) was cited, but the learned Judge held, that as the plaintiff had been committed upon a different statute, the formal conviction afterwards drawn up was no answer to the action. Evidence was then tendered under the authority of 43 *Geo.* 3. c. 141. to shew that the plaintiff had been in point of fact guilty of the offence imputed to him in the conviction, but this evidence was rejected by the learned Judge, and the jury under his direction found a verdict for the plaintiff damages 23*l.*

Sir *William Owen* now moved for a new trial on two grounds, first, that the formal conviction drawn up by the defendant must be taken as proof of the facts therein stated, and, therefore, was an answer to the action; and, second, that the learned Judge had improperly rejected proof that the plaintiff was guilty of the offence imputed. As to the first point, it is clearly established by several cases, that in an action against a magistrate for an act done within his jurisdiction, a subsisting conviction drawn up conformably to the statute, upon which it is founded,

(a) 16 *East*, 13.

is to be taken as conclusive evidence of the facts stated therein, and is a complete defence to the action. *Strickland v. Ward* (a) and *Gray v. Cookson* (b). The conviction produced in this case was quite sufficient to answer any ground of action, arising from the commitment produced by the plaintiff. That commitment, which was founded upon an older statute, might have been drawn up by some officious person, without the authority of the magistrate; but it would not support an action, if it appeared that the magistrate had afterwards drawn up a formal conviction upon the statute, against which the plaintiff had offended. The case of *Gray v. Cookson* is an express authority, that a magistrate may draw up his conviction after the party has been committed. Here the conviction produced was founded upon the 6 Geo. 3. c. 48., and it was laid down in the same case, that if a conviction be good upon the face of it, the production and proof of it at the trial will justify the convicting magistrate under the general issue, in an action of trespass, as well in respect of such facts therein stated, as are necessary to give him jurisdiction, as upon the merits of the conviction. In this case there was nothing to shew any informality or irregularity on the face of the conviction, and, therefore, on the authorities cited it was a complete answer to the action. [*Abbott, C. J.* The question is, whether a magistrate who commits a person for a supposed offence against one statute, which turns out not to be applicable to his case, shall be at liberty to relieve himself from liability, by producing a conviction on another statute, under which he might have been committed. Here the conviction and judgment do not appear to have been grounded upon any offence stated in

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(a) 7 T. R. 633.

(b) Vide *Massey v. Johnson*, 12 East, 67, and *Britton v. Kinnaird*, 4 J. B. Moore, 50. 1 B. and B. 432. S. C.

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the commitment. The magistrate signs the commitment for an offence committed against one statute, and the conviction is drawn up for an offence against another.—*Bayley, J.* In *Gray v. Cookson* there was nothing to shew that the apprentice was not originally committed upon a good conviction. Here, in order to render the commitment good, it must appear that it was founded upon the same statute as the conviction, whereas the conviction proceeds upon a different statute.] But if the magistrate may draw up his conviction after the commitment, the error may be cured, and the conviction will have relation to the offence actually proved against the party. At all events the learned Judge improperly rejected the evidence tendered to prove that the plaintiff actually committed the offence stated in the conviction. By the 43 Geo. 3. c. 141. it is enacted that in all actions brought against any justice, for or on account of any conviction made by him under any act of parliament, or for any act done or commanded by him, for the levying any penalty, apprehending any party, or about carrying such conviction into effect, in case such conviction shall have been quashed, the plaintiff, besides the value of the penalty which may have been levied, shall not recover any more damages than two pence, nor any costs of suit unless it shall be expressly alleged in the declaration in such action, which shall be an action on the case only, that such acts were done maliciously and without any reasonable or probable cause; and by the second section of the same statute it is enacted that the plaintiff shall not recover back the penalty levied, nor any damages or costs, if the justice proves at the trial that the plaintiff was guilty of the offence. Now the learned Judge held, that this statute applied only to those cases where the conviction *had been quashed*, but if that be the true construction it would have the effect of placing the ma-

gistrate in a better situation where his conviction was quashed, than he would be where it was perfectly regular and valid in every respect. [Abbott, C.J. That provision was introduced into the act of parliament for the purpose of giving a general defence to the magistrate, but inasmuch as it might happen that the conviction was quashed for form and not upon the merits, the legislature enacted that although the conviction was quashed, yet the party should only recover certain damages, unless he proved that the magistrate acted from malice, and without any reasonable or probable cause.] The argument must go the whole length of saying that whether the conviction shall or shall not have been quashed, the plaintiff can only recover two pence damages in the absence of any proof of malice. [Bayley, J. Your argument would go this length, that if a man be convicted upon perfectly insufficient evidence, yet if the conviction be not quashed the magistrate would be at liberty, in answer to an action, to go into evidence for the purpose of shewing that he might have convicted him upon such evidence.] The argument must certainly go that length; but at all events this was admissible evidence in reduction of damages, because it went to shew that the defendant had acted without malice, and had reasonable and probable cause for the commitment.

ABBOTT, C. J.—I think there is no ground for disturbing this verdict. It appears to me that the conviction cannot be in any way connected with the commitment, and consequently it furnishes no defence to the action. I am also of opinion that the conviction not having been quashed, it does not come within the provisions of the 48 Geo. 3. c. 141. which in express terms applies to actions brought in cases where *the conviction has been quashed*. That point was expressly decided in *Gray v. Cookson*. The only remaining point is, whether the learned judge

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ought to have received evidence that the plaintiff had actually committed the offence for which the conviction was drawn up. Adverting to the amount of the damages given, they very little exceed 20*l.*, which is all that the plaintiff could have paid in pursuance of the conviction had it been good, but if the commitment was bad, it is impossible to say that the plaintiff could properly have recovered less damages than the jury had given.

BAYLEY, J.—The conviction offered in defence may be perfectly good, but the commitment not being in pursuance of the conviction there is no answer to the action. The conviction is grounded upon the 6 Geo. S. c. 48., but it is difficult to say upon what statute the commitment has proceeded. After the magistrate has made out an erroneous commitment, and the party is carried to prison, he cannot afterwards correct his error, and defend himself by making out a conviction for an offence of which the party might have been guilty. If the plaintiff, in this case, had been committed for the same offence as that mentioned in the conviction, the conviction would have been a defence to the action, but it is no answer to an action for a wrongful commitment for one offence, to shew that the plaintiff has been guilty of another. There may possibly be hereafter a valid commitment upon the conviction, but with that we have nothing to do at present. The damages given in this case do not appear to have been vindictive, and as the plaintiff was entitled to recover something, supposing the evidence tendered was inadmissible, it would be mischievous to the defendant to send the case down to another trial, in order to determine whether the plaintiff ought to recover 20*l.* or 23*l.* I, therefore, think there ought to be no new trial.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule refused.

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Tuesday,

November 16.

THE KING v. The JUSTICES of SURREY.

LETT moved for a rule to shew cause why a writ should not issue to the Justices of the eastern hundred of *Brixton*, in the county of *Surrey*, commanding them to re-hear an application for an ale license, at *Marton*, for a public house, within their jurisdiction, being suggested that the magistrates had refused to grant an applicant a license for the house in question under a misapprehension of the law. The only difficulty was, whether the Justices had jurisdiction to grant the license at any period of the year except at the annual meeting in the month of *September*. By the 26 Geo. 2. c. 31. s. 4. it is enacted that "no license shall be granted but on the 1st of *September*, yearly, or within twenty days after, that such license shall be made for one year only, to expire on the 29th day of *September*," and by s. 16. there is an exemption of cities and towns corporate as to the time of granting licenses. The 3 Geo. 4. c. 77. s. 7. repeals the exemption in favour of cities and towns corporate, and enacts "that from and after the passing of this act, all general annual meetings of the justices or magistrates for the purpose of granting licenses to sell beer, and other exciseable liquors, by retail, as well as in cities and towns corporate, as in all other places within that part of the United Kingdom called *England*, shall be held in the month of *September* in each and every year, notwithstanding any custom or usage to the contrary thereof in any place notwithstanding." Now, as this statute was passed for the purpose of introducing new regulations as to the mode of licensing ale houses, the 7th section ought to be given a liberal construction. [*Bayley*, J. Have the justices any power to grant licenses except in the month of *September*?] They are directed by the 7th section to hold the meeting in *September*, though the Justices may have refused a license under a mistake of the law.

By the 26 G. 2. c. 31. s. 4. no ale license shall be granted but on the 1st *September* yearly, or within twenty days after, and by s. 16. ale-houses in cities and towns corporate are excepted; but by 3 G. 4. c. 77. s. 7. all general annual meetings for granting licenses, as well in cities and towns corporate as in all other places in *England*, shall be held in the month of *September*, yearly:—Held, that the effect of this clause was not to repeal the general provision of the former statute, but to extend its operation to cities and towns corporate only.

Mandamus will not lie to the Justices to re-hear an application for an ale license at any other period of the year than within the first twenty days of *September*.

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meet in that month, but there is nothing in the late statute which makes it imperative upon them not to grant a license at any other period of the year. It is submitted that the late statute leaves it open to the Justices to grant a license at any time in the year, except in cities and towns corporate, and if so, then it is competent to the Justices to hear an application for a license, though the first twenty days of September may have elapsed. It is obvious that by the last statute the Justices have the whole month of September to grant the license, which is a material alteration of the provision in the 26 Geo. 2., which limits the time within the first twenty days of the month.

PER CURIAM.—We are clearly of opinion that the Justices have no power to grant a license at any other period of the year than during the month of September. The 4th section of the 26 Geo. 2. c. 31. is not repealed by the 3 Geo. 4. c. 77. s. 7. By the 16th section of the first mentioned statute there was an exception as to cities and towns corporate. The object of the 7th section of the 3 Geo. 4. c. 77. is to extend the general provision of the 26 Geo. 2. so as to apply to cities and towns corporate. Whether the operation of section 7 of 3 Geo. 4. c. 77. is to extend the time of granting licenses in cities and towns corporate up to the 30th September, is a point not necessary to decide, but it is quite obvious that that section cannot be construed to alter the provision in the 26 Geo. 2. c. 31. s. 4. as to the time within which the license shall be granted, unless the two clauses are contradictory, which they certainly are not; and therefore the general provision in the 26 Geo. 2. remains in force, and consequently the Justices have no jurisdiction to grant a license but on the 1st day of September, yearly, or within twenty days after.

Rule refused (a).

(a) *Vide Rex v The Justices of Farringdon Without*, ante, 364.

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The KING v. The INHABITANTS of LAMPETER.

TWO Justices made their order, dated 14th *May*, 1821, for the removal of *Gwen Rees*, widow, from the parish of *Lampeter* to the parish of *Llanfairclydoga*, both in the county of *Cardigan*; but on the same day suspended the execution of the order, on account of the age and infirmity of the pauper, which in their opinion rendered it unsafe for her to travel. The same Justices, on the 16th *February*, 1824, made another order, which, after reciting that the pauper was dead, and that it had been duly proved before them on oath, that an expense of 12*l.* 13*s.* 6*d.* had been occasioned by the suspension of the order of removal, directed the churchwardens and overseers of *Llanfairclydoga* to pay that sum to the churchwardens and overseers of *Lampeter*, or to such of them as should demand the same. Both these orders were served upon the appellants, for the first time, on the same 16th *February*, and the sum of 12*l.* 13*s.* 6*d.* was at the same time demanded of them; upon which they appealed against the order of removal. The appeal was heard at the last *Easter Quarter Sessions* for the county of *Cardigan*, when the Court held that the order of removal and suspension never having been served or executed in the pauper's lifetime, nor after her death until the money was demanded, the order of removal had become a nullity, and the respondents were not entitled to give any evidence in support of that order, or of the adjudication of the pauper's settlement in the appellant parish. The order of removal was consequently quashed, subject to the opinion of this Court.

A suspended order of removal must be served within a reasonable time. Therefore, where an order of removal was made and suspended on the same day, on account of the age and infirmity of the pauper; and she survived three years, but no notice of the order of removal was served on the parish to which she was ordered to be removed, till after her death:—Held, that the service was not within a reasonable time, and that the order of removal was void.

W. E. Taunton and Russell, in support of the order

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of Sessions. The question arising upon the facts of this case is somewhat novel in its nature, and extremely important in its consequences. The Court are now, for the first time, called upon to decide whether a parish can recover the expenses incurred by them in consequence of the suspension of an order of removal under the 35 Geo. 3. c. 101. s. 2., where the pauper died before removal, and where no notice of the order of removal, or of the suspension, was given, until after the pauper's death, to the parish to which she was ordered to be removed. No direct authorities are to be found upon this point, but *Rex v. Chagford* (a) seems to throw some light upon it. There, a pauper, during the suspension of an order of removal, became irremovable, in consequence of an estate descending to him, and it was held, that such a case was not within the act, and that the pauper not having been removed, no order for the payment of any charges incurred during the suspension of the original order of removal, could be made. *Bayley, J.*, in his judgment there, seems to put the question upon the true ground, for he says, "a very long period has elapsed, during which this order remained suspended, and no notice of it was given to the opposite party. Now, if that notice had been given, (and there are no words in the act that supersede the necessity of it,) it might have enabled the other parish to have made prompt inquiry, and to have ascertained the fact relative to the settlement of the pauper. I think, therefore, that this affords an additional reason for holding that the Sessions have come to a right conclusion in this case." That observation applies to this case, for here the evidence of the pauper, which would have been so material in ascertaining where the real settlement was, has been lost, and the most important witness in the case has been wholly excluded. Great

(a) 4 B. & A. 235.

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inconvenience and injustice is produced in another point of view, because this delay has the effect of shifting the burthen of the expenses from those who ought, to those who ought not, to bear it. The inhabitants of a parish for the time being, are the proper persons to bear the expenses of maintaining its poor; but in a case like this, new inhabitants, who have come into the parish since these expenses were incurred, must necessarily be charged with a portion of them. It is enacted by the 49 Geo. 3. c. 124. s. 2., that in cases where the order of removal is suspended, the period for appealing against it shall be computed, not from the time when the removal is made, but from the time when the order is served; implying, therefore, that the order may be served, and indeed that the legislature intended it to be served, before it is carried into execution, that is, before the pauper dies. In *Rex v. St. Mary-le-Bone* (a), neither the order of removal or suspension was served until after the death of the pauper, and though it was not there held, for indeed the point did not arise, that the order of removal in consequence became a nullity, still it was held that the subsequent order to pay the expenses was a grievance, and that an appeal against it was given by the 3 W. & M. c. 11. s. 9.

R. V. Richards, contra. This case must be governed by that of *Rex v. St. Mary-le-Bone*. There the order of removal was suspended; and the pauper died without any removal taking place, and without the order being served, or any notice of its existence being given. The judgment of the Court there turned upon the 3 W. & M. c. 11., and decided, that the order for payment of the expenses was a grievance, against which that statute gave an appeal. Now, if the Court there had been of opinion

(a) 13 East, 51.

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that the order of removal was void for want of service or notice, the case would at once have been disposed of on that ground, and no discussion would have taken place upon the other point. The inference, therefore, is, that the proceedings towards the removal were not considered altogether as a nullity, in that case, and that the service of the order of removal after the death of the pauper was deemed a good service.

ABBOTT, C. J.—I am of opinion that the Sessions came to the right conclusion in this case. The utmost effect of the case of *Rex v. St. Mary-le-Bone* is this; that the death of a pauper during the suspension of an order for his removal, does not render that order a nullity; and that a subsequent order for payment of the expenses is a grievance upon the parish to which the pauper is ordered to be removed, for which an appeal will lie against that order. No question arose in that case respecting the necessity of serving or giving notice of the order of removal, or the order for suspending it; that question arises, for the first time, in the present case. The legislature have no where fixed any precise time for the service, but it is evident from the 49 *Geo. 3. c. 124. s. 2.*, that such an order *may* be served previous to a removal; therefore, if a suspended order *may* be served, and reason and justice require that it *should* be served, it certainly should be served within a reasonable time. In this case a period of three years elapsed between the issuing of the original order of removal and the death of the pauper, and during all that period no notice was given either of the original order, or of the order for its suspension. I am, therefore, of opinion that the order of removal in this case was not served within a reasonable time, and consequently that the order of Sessions, quashing that order, must be confirmed.

BAYLEY, J.—The judgment of this Court in *Rex v. St Mary-le-Bone*, is perfectly consistent with the judgment now delivered by my Lord Chief Justice. In that case the pauper died before the next practicable sessions after the order of removal was made, therefore the parish sought to be charged had no possibility of appealing against that order during his life. By the 35 Geo. 3. justices were empowered to suspend the order of removal, and to direct the costs of suspension to be paid to the removing parish; and it was held in the case alluded to that an order for such costs was a grievance within the 3 W. and M. c. 11. s. 9., for which an appeal would lie. It is quite consistent with that decision, as it is also with the provisions of the 49 Geo. 3. c. 124., that the service of the order of removal should not be delayed for an indefinite period; and it is but just that the parish upon which it is sought to cast a burden, should have the earliest opportunity of enquiring whether they are liable to bear that burden or not. A delay of three years has deprived the appellant parish in this case of every such opportunity, because it has taken away from them the power of examining the most important witness, the pauper; and it has been productive of this further injustice, that it has tended to throw the expense of supporting the pauper, during that interval, upon persons who were not then inhabitants of the parish, and who, therefore, ought to be exempt from such a liability.

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LITLEDALE, J. concurred.

Order of Sessions confirmed.

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Wednesday,
17th Nov.

The KING *v.* The Churchwardens and Overseers of
the Poor of CHRIST'S Parish in YORK.

Where a pauper, 10 years old, went to service "for meat and clothes, as long as he had a mind to stop, to do what he could, and what he was bid," and he remained two years:—Held, that this was not a yearly hiring, and that a settlement was not acquired by service under it.

BY an order of two Justices, *William Herby, Jane*, his wife, and *Ann*, their child, were removed from the township of *Saint Mary Gate*, in the North Riding of the county of *York*, to *Christ's* parish, in the city of *York*; and the sessions, upon appeal, confirmed their order, subject to the opinion of this Court upon the following case:—

The father of the pauper was settled in *Christ's* parish, and the pauper lived with his parents till he was about ten years old, when he went to Mr. *Francis Peacock*, for meat and clothes, as long as he had a mind to stop. *Peacock* then lived at *Craike*, was a wood carrier, and had two farms. The pauper was to do what he could, and what he was bid. He staid rather more than two years in *Peacock's* service; in the parish of *Craike*, and was supplied with meat and clothes. The pauper's father did not hire his son to *Peacock*, and believed the bargain was only for meat and clothes. The Court being of opinion that such service in *Craike* was not sufficient to give the pauper a settlement there, confirmed the order as aforesaid.

Tindal, in support of the order of sessions. There are three several grounds upon which the Court must hold that this pauper gained no settlement in the parish of *Craike*. First, the father was no party to any contract of hiring to *Peacock*, and the pauper, being an infant, was not sui juris to make any contract for himself, such as would give *Peacock* control over him, or constitute the relation of master and servant between them. There

was, therefore, no hiring, and it can only be presumed that *Peacock* took the lad into his house from motives of charity, and a service under such circumstances will not confer a settlement. *Rex v. Wayhill* (a). Secondly, the sessions have not found as a fact that there was any contract of hiring, and in the absence of that fact the Court cannot presume it; *Rex v. Seacroft* (b). Thirdly, even if there was a contract for a hiring, it was not for a year, it was only for the pauper to stop "as long as he had a mind to stop," and that is clearly insufficient to confer a settlement.

Nolan and *Alexander*, contra. A settlement has been gained by hiring and service in *Craike*. An infant may enter into a contract without the interference of his father, if it be a beneficial one, which this clearly was, because the pauper, although so young, was to receive clothes and victuals in exchange for his services. *Rex v. Wayhill* does not govern this case, because there it was expressly found as a fact that the pauper was employed from motives of charity; here it is not so found, and there is no reason why the Court should presume the fact. The sessions are not bound to find a contract of hiring as a fact, *Rex v. Chertsey* (c) and *Rex v. Worfield* (d); and there have been instances in which it was impossible to find such a fact, and yet where the court have held that a settlement was gained, *Rex v. Holy Trinity* (e). A contract to receive clothes and victuals in return for service is sufficient; it is not necessary that there should be an agreement for the payment of wages in money; *Rex v. Worfield* (d). This was a general hiring, which the Court will infer to have been a hiring for a year in the absence of proof to the contrary,

(a) Burr. S. C. 491. (b) 2 M. and S. 472. (c) 2 T. R. 39.

(d) 5 T. R. 506. (e) Cald. 101.

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especially when there has been a service for a year under it. Then it was a yearly hiring with a condition annexed, namely, that the pauper should be at liberty to quit the service if he chose; but that condition never having been acted on, and a year's service having been completed, the contract becomes the same as if the condition had never been inserted, and a settlement is acquired. *Rex v. Sidney*(a), *Rex v. New Windsor*(b), *Rex v. Atherton*(c), *Rex v. St. Ebbs*(d), *Rex v. Putney*(e), *Rex v. Northwold*(f), and *Rex v. Byker*(g). The mere privilege that the pauper had of quitting the service if he chose cannot affect the case, because such a privilege must always exist, and may always be implied; as was laid down by Lord *Ellenborough* in *Rex v. Mitcham*(h). There are some few cases apparently opposed to the present argument, but upon examination they will all be found to differ from the present in their circumstances. In *Rex v. Elstark*(i) and *Rex v. Dedham*(k), the presumption of a yearly hiring was completely rebutted by the fact that there was an express agreement for weekly wages; and in *Rex v. Bradninch*(l) the same effect was produced, because there the pauper agreed to live with his master by the week.

ABBOTT, C. J.—It cannot be denied that a general hiring is by construction of law a hiring for a year, if nothing appears upon the face of the case to rebut that presumption. Here no such presumption can arise, because the pauper went “for meat and clothes, as long as he had a mind to stop,” and consequently

(a) Burr. S. C. 1.

(c) Id. 203.

(e) 2 Bott. 191. pl. 254.

(g) Ante, 15.

(i) 2 Bott. 203. pl. 264.

(l) Id. 662.

(b) Id. 19.

(d) Id. 289.

(f) Ante, vol i. 413.

(h) 12 East, 351.

(k) Burr. S. C. 653.

might have quitted the service any hour he chose. That completely negatives the idea of a hiring for a year; and, therefore, upon that short ground I am clearly of opinion that no settlement was gained in *Cruik*.

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BAXTER, J.—I am of the same opinion. There was a case of *Rex v. Trowbridge*, in *Easter Term*, 1816, not reported, which was almost parallel to the present, and where this Court held that a hiring “for as long time as the pauper pleased,” was a hiring at will, and rebutted the presumption of a hiring for a year.

Littledale, J. (a) concurred.

Order of sessions confirmed.

(a) *Holroyd*, J. was in the Bail Court.

The KING v. The Inhabitants of GREAT WIGSTON.

Saturday,
20th Nov.

TWO Justices by their order, dated 3rd February, 1823, removed *John Sampson*, *Mary*, his wife, and *Olive*, their child, from the parish of *St. Margaret*, in the borough of *Leicester*, to the parish of *Great Wigston*, in the county of *Leicester*; and the sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case.


An infant can do no act to bind himself, except such as is clearly for his own benefit; therefore, though he may bind himself an apprentice, he cannot dissolve the indenture.

The pauper, when he was eleven years old, was bound apprentice to *John Humberston*, of the parish of *Great Wigston*, for the term of seven years. The indenture

Where an infant, bound himself apprentice

for 7 years, and after serving 3 years quarrelled with his master, paid him six pence for the remainder of his time, and then left him, and bound himself to another master in another parish:—Held, that the apprentice had no power to dissolve the first apprenticeship, and that the second, therefore, was invalid, and conferred no settlement.

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was executed by the master, the pauper, and *John Bullivant*, the grandfather of the pauper, the pauper's father being a soldier abroad. The grandfather paid a premium of 7*l.* to *Humberston*. The pauper served *Humberston* under this indenture for between three and four years at *Great Wigston*, when some disagreement taking place between them, *Humberston* agreed to sell the pauper the remainder of his time for six pence. The pauper accordingly paid *Humberston* the six pence, and left him the same day. The indenture had never been in the possession of any of the parties, but had been kept for all the parties by the person who prepared it, and no application was made for it to be delivered up. The grandfather was not a party to the agreement for parting entered into between the pauper and his master, and was not even privy to it. A few days after the pauper left *Humberston* he bound himself apprentice to *Thomas Waine*, of the parish of *Saint Mary*, in the borough of *Leicester*, for seven years, and served him under the indenture for five years, and resided during the whole of that time in that parish.

S. M. Phillipps and *Humfrey*, in support of the order of sessions. The pauper was properly removed to *Great Wigston*. The second indenture was void, because the first was never legally determined. The pauper himself could not put an end to it, because he was an infant, and, therefore, incapable of making any contract except for his own benefit. Now the dissolution of the first indenture was an act prejudicial to him, and one consequently which the law would not allow him to do; this case, therefore, is in that important respect perfectly distinguishable from *Rex v. Mountsorrel (a)*, and cannot

(a) 3 M. and S. 497.

be governed by it. The first contract having been made by deed could not legally be dissolved by parol, even if all the contracting parties had joined in the dissolution; *Rex v. Bow* (a) and *Rex v. Skeffington* (b); but they did not all join, for the grandfather, who was a party to the first indenture, was not a party to its dissolution, nor even privy to the fact; and *Rex v. Austrey* (c) is an authority to shew that it was necessary that all the parties should join. Lastly, the dissolution of the first indenture was a fraudulent transaction on the part of the master, because he had received a considerable premium with the apprentice, and was, therefore, bound either to keep him during the whole of the time, or to return part of the premium, and on that ground also the dissolution is clearly void. Therefore, the first indenture remaining valid, and the second being for the reasons already stated a nullity, the pauper could gain no settlement under that, and consequently has been properly removed to *Great Wigston* as his only place of legal settlement.

G. Marriott and Simons, contra. There is nothing upon the face of the case to warrant the assertion that the dissolution was a fraudulent act on the part of the master, and where fraud is not expressly found, the Court will not presume it. There is no real distinction between this case and *Rex v. Mountsorrel*. There the dissolution was by parol, and the apprentice was an infant at the time; and here the dissolution was beneficial to the apprentice, because the case finds that he and the master were mutually discontented. *Rex v. Skeffington* differs from this case, because the Court there decided upon the ground that it was not shewn that the


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(a) 4 M. and S. 383.

(b) 3 B. and A. 382.

(c) Burr. S. C. 441.

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apprenticeship had ever been well constituted; and *Rex v. Austrey* is equally distinct, for that was the case of a parish binding, and, therefore, the apprentice there not having been a party to the indenture could not possibly have any power to dissolve it. The grandfather not having joined in the dissolution here is perfectly immaterial, because he had no authority to become a party to the indenture while the father of the apprentice was alive; therefore, having interfered unnecessarily in the deed, his interference could not be necessary in the agreement. In this view of the case the dissolution of the first indenture was legal and complete, and the proper place of the pauper's settlement is the parish in which he served under the second indenture.

ABBOTT, C. J.—I am satisfied that the sessions have done right in settling this pauper in the parish of *Great Wigston*. It is a general rule of law that an infant cannot do any act to bind himself, except such as is evidently for his own benefit. The act of binding himself an apprentice has been considered as coming within the exception, and upon that principle it has been held that an infant may be a party to an indenture of apprenticeship. But if the act of binding himself an apprentice is for the benefit of the infant, it is impossible to contend that the act of dissolving such a contract is for his benefit also; for such a proposition clearly involves a contradiction in terms and an absurdity in fact. Then having ascertained what is the general rule of law, and what the exception to it, it remains only to inquire whether this particular case comes within that exception; or, in other words, whether the dissolution of the apprenticeship here was for the benefit of the infant. In *Rex v. Mountsorrel* the master had run away and deserted the apprentice, the latter, therefore, was no longer

in a situation to reap any of the advantages expected to result from the contract. Upon that ground the Court did think that in that particular case it was for the benefit of the apprentice to be released from the indenture, and in my opinion rightly, because otherwise he must have remained bound by a contract from which he could not possibly derive any advantage. But here there are no facts presented to our notice from which we can infer that the dissolution of the apprenticeship was beneficial to the infant, and, therefore, as the case does not come within the exception it does come within the general rule, and the first binding never having been legally dissolved, the second is a nullity, and no settlement could have been gained by service under it. On this single ground I am of opinion that the order of sessions must be confirmed.

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BAYLEY, J.—I am of the same opinion. The sessions were clearly right in the decision to which they came upon this case; the only error they have committed, and of which the Court have a right to complain, is, that they have sent a case for our opinion upon which no reasonable mind could entertain a doubt.

HOLROYD, J. concurred.

Order of sessions confirmed (a).

(a) *Littledale*, J. was sitting at nisi prius at Guildhall.


The KING v. The Inhabitants of LUTTERWORTH.

Saturday,
20th Nov.

BY an order of two Justices, *Mary*, the wife of *William Hickley*, a soldier, and *Francis*, their son, aged six months, for the maintenance of its poor, and a guardian is appointed, under the 22 G. 3. c. 83; the churchwardens and overseers may still bind out poor children apprentices and the indentures need not be signed by the guardian.

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parish is in-
corporated
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were removed from the parish of *Lutterworth* to the parish of *Huncote*, both in the county of *Leicester*; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case.

William Hickley, a poor child, of the parish of *Broughton Astley*, was bound apprentice by the churchwardens and overseers of that parish, with consent of two magistrates, by indenture dated 19th *January*, 1807, to *Benjamin Elliott*, of the parish of *Huncote*; and he served him in *Huncote* under that indenture for the term of his apprenticeship. At the time when the pauper was bound out, the parish of *Broughton Astley* formed part of the incorporation of the house of industry at *Ellesthorpe*, in the same county, under the provisions of the 22 G. 3. c. 38. *George Lakin* was appointed guardian of the poor of *Broughton Astley* at *Easter*, 1803, by two magistrates. That appointment is in existence; but though *George Lakin* continued to act as guardian for *Broughton Astley* for several years afterwards, and was acting in that capacity at the time the boy was bound out, he was not made a party to that indenture, nor can any subsequent appointment be found.


G. Marriott and *Simons*, in support of the order of sessions. The indenture of apprenticeship in this case was not signed by the guardian of the poor, and consequently was void ab initio, for the signature of the guardian is made indispensably necessary by the 22 G. 3. c. 83. s. 7. That section imparts to every guardian of the poor, "all the powers and authorities given to overseers of the poor by any other act or acts of parliament," and enacts that every such guardian "shall to all intents and purposes, except with regard to the making and collecting of rates, be an overseer of the poor for the parish or township for which he shall be so ap-

pointed guardian;" and then, after enumerating various acts to be performed by the guardian, provides that "in all cases where such guardian of the poor shall be appointed as aforesaid, neither the churchwardens or overseers of the poor shall interfere or intermeddle in the care and management of the poor." The case finds that a guardian of the poor was appointed for this parish in the year 1803, and that he continued to act in that capacity several years, and was so acting at the time when the pauper was bound; the Court, therefore, must presume that he was regularly re-appointed, and that he continued all that time to hold the office *de jure*, as he was in the first instance invested with it *de facto*: and then it follows that he, and he only, should have signed the indenture, and that the churchwardens and overseers had no authority to interfere in the matter. The preceding statute of the 20 *Geo. 3. cap. 36.* throws some light upon the statute now under consideration, and is important to the due decision of this case. It enacts, "that when guardians of the poor are appointed, persons to whom any poor children are bound apprentices shall receive them according to the indenture to be executed by the directors and acting guardians of the poor for the binding of such poor children, in like manner as persons are now obliged by the laws in being to receive and provide for poor children appointed to be bound apprentices by churchwardens and overseers of the poor, with the assent of two Justices." Section 30. of the 22 *G. 3. c. 83.* must be construed with reference to the former statute, and that, after providing for the maintenance of poor children until they arrive at a proper age to be bound apprentices, enacts, that when they do arrive at such proper age, they shall be bound apprentices at the cost of the parish to which they respectively belong, "according to the laws in being." Now the 20 *G. 3.*

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c. 36. was then "a law in being," made to compel persons to receive poor children bound apprentices by guardians of the poor; and that expressly provides that the binding shall be by the guardians and not by the churchwardens and overseers. The case of *Rex v. Martyr* (a) shews that a guardian acting under the 22 G. 3. c. 83., though not legally appointed, is competent to act as such in other matters respecting the regulation of the poor, and the statute shews that in this particular matter no other person but the guardian is competent.

S. M. Phillipps and Humsfrey, contra. It is not expressly found by the case that any person was legally appointed guardian of the poor of the parish to which this pauper belonged, at the time when he was bound apprentice; and the Court will not entertain an objection tending to defeat a settlement, unless it is founded upon clear and explicit facts. But, assuming that there was a guardian legally appointed, and that he was empowered by the statute to bind poor children apprentices, still there is nothing in the statute to shew that he was the only person so empowered. No clause can be found in which it is required that the guardians shall execute the indentures, though there are clauses which do require their interference in other specified matters. The guardians are indeed by section 7 invested with all the powers belonging to overseers, and therefore they are empowered, among other things, to bind out apprentices; but it by no means follows from that, that the overseers are ousted of their jurisdiction in that respect, for the latter part of that section, which directs that neither the churchwardens or overseers shall interfere, where there are guardians, has reference only to "the care and management of the poor," and not to the binding out apprentices. But

(a) 13 East, 55.

section 30 is conclusive of this case, in favour of the indenture, because that enacts, that where there are guardians they shall provide for the maintenance of poor children till they are of a fit age to be bound apprentices, and that then such children shall be so bound "according to the laws in being;" not "according to this act." The law in being relating to this particular subject, and, with some few exceptions, regulating the binding of apprentices, was the 49 *Eliz. c. 2.*; this pauper was bound "according to" that law; consequently his was a valid binding, and by performing the necessary service under it, he has acquired a settlement. It is hardly necessary to add that as the indenture is to confer a settlement, and the objection is to defeat it, the Court will make every reasonable intendment in favour of the one, and against the other. *Res. v. Catesby (a).*

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ABBOTT, C. J.—I am of opinion that the indenture of apprenticeship stated in ~~this~~ case was a valid indenture, and that the service performed under it in *Huncote* conferred upon the pauper a settlement in that parish. The seventh section of the 22 G. 3. c. 83. is somewhat ambiguous, and has a tendency to raise some doubt upon the point, because it certainly prohibits the interference of churchwardens and overseers in the care and management of the poor of those parishes in which guardians are appointed. But subsequent sections of the act vest in the guardians of the poor various powers, in express terms, and the thirtieth section in particular empowers them to provide for the maintenance of poor children till they are of an age to be bound apprentices, and then directs that such children shall be so bound "according to the laws in being." The 49 *Eliz. c. 2.* was one of the laws then in being relative to that subject, and that directs

(a) Ante, 278.

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that parish apprentices shall be bound out by the churchwardens and overseers of the poor. The pauper was so bound, and in my opinion most properly, for I think it much more desirable that the binding should be effected by all the parish officers, or the majority of them, than by a single guardian of the poor.

BAYLEY, J.—I am of the same opinion. I think the true construction of the act is, that the guardians shall have the charge and management of poor children, till they arrive at that age when they may properly be bound apprentices, and that then their power in that respect shall cease.

HOLROYD, J. concurred. (*a*)

Order of Sessions quashed.

(*a*) *Littledale, J.* was absent.

Monday,
22d Nov.

The KING v. The Justices of LINCOLNSHIRE.

The Sessions have no jurisdiction to receive an appeal in a matter of bastardy until the requisites of 49 G. 3. c. 68. ss. 5 and 7 have been complied with, as to the notice of appeal and entering into a recognizance. Notice of appeal for an adjourned Session for a different division of a county does not satisfy the requisites of that statute.

THIS was a rule calling on the defendants to shew cause why a mandamus should not issue commanding them to enter, as of the last *Easter* General Quarter Sessions, the appeal of *John Ulyatt* against an order of two justices adjudging him to be the reputed father of a bastard child, begotten on the body of *Jane Bannister*, and to cause continuances to be entered until the next General Quarter Sessions, and then to hear and determine the said appeal. It appeared from the affidavits that the order of filiation was made on the 14th *January* last,

A Rule of practice at Sessions will not control the express words of an act of parliament.

and that the *Easter* General Sessions for the county were held on the 27th *April*. No notice of appeal having been given, nor any recognizance entered into pursuant to the 49 *Geo.* 3. c. 68. s. 7. the appellant's attorney applied to the justices assembled at the *Easter* Sessions to enter the appeal and respite it until the next *Midsummer* Sessions. The Court called upon him to prove his notice and recognizances, but being unable so to do, they refused the motion. It was stated in the affidavits in support of the rule, that the practice of the *Lincolnshire* Sessions was to receive appeals of this description without notice, and enter and respite them until the following Sessions. But on the other hand it appeared from the affidavits of the clerk of the peace and others, that the invariable practice of those Sessions was never to receive or hear any appeal in matters of bastardy unless notice was given and the recognizance entered into as required by the statute. The appellant had in fact given notice of appeal for the *adjourned* Sessions which were held on the 6th *May*, at *Spalding*, for another division of the county.

Balguy now shewed cause. The Justices at Sessions had no jurisdiction to receive the appeal until the appellant had complied with the requisites of the 49 *Geo.* 3. c. 68. By section 5 of that statute, the party intending to appeal against an order of filiation, must give ten days notice before the General Quarter Sessions at which the appeal is to be made, and enter into a recognizance within three days after such notice with sufficient surety conditioned to try the appeal, and *upon proof* of such notice and recognizance the justices are required to hear and determine the cause and matter thereof; and by section 7 it is enacted, "that no appeal in any case relating to bastards shall be brought, received, or heard at the said

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Quarter Sessions unless such notice shall have been given, and such recognizance shall have been entered into in manner aforesaid, according to the provisions of this act."

The giving notice and entering into the recognizance required by the statute, are conditions precedent even to the entry of the appeal, and as these conditions had not been complied with, in the present case the justices had no authority to receive the appeal. It may be true that the appellant has given notice of appeal in time for the *adjourned* Session for another division of the county of *Lincoln*, but that will not cure the objection, because the notice must be given for the "next General Quarter Sessions" of the county. *Rex v. The Justices of Oxfordshire* (a) is an authority to shew the necessity of giving due notice of the appeal in matters of bastardy, in order that the respondents may come to the Sessions fully apprized of the grounds of appeal.

D. F. Jones, contra. The terms of the statute are certainly very general, but when the principal object of the legislature is considered, the Court will not construe the prohibitory part of the appeal clause too strictly. The main object of the statute was to give a more extended remedy than existed before against the reputed fathers of bastard children, with respect to the expenses incurred by parishes. Now though the appeal clause requires that the notice shall be given and the recognizance entered into within a certain time before the "*General Quarter Sessions*," yet those words are to receive a liberal construction, for if it appears that Sessions are held for different divisions of a county, the Sessions for each division are to be considered as General Quarter Sessions for each division respectively, and a notice and recogni-

(a) Ante, vol. i. 28

zance for the divisional Sessions will be a sufficient compliance with the requisites of the statute. Here there are two Sessions held for different divisions of the county, one at *Boston* and the other at *Spalding*. If the appellant was not in time to give his notice for the Sessions at *Boston*, he might enter his appeal there and have it tried at the adjourned Sessions for *Spalding*, if in the mean time he gave the requisite notice and entered into the recognizance. Now the appellant did give a proper notice and enter into the recognizance for the Sessions at *Spalding*, which is a substantial compliance with the requisites of the statute. This construction is not inconsistent with the general scope of the act, and as it is sworn to be the practice to enter appeals at the General Sessions without notice, and adjourn the hearing of them until the following Sessions, it is but reasonable that this mandamus should issue. He cited *Rex v. Coystan* (a).

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ABBOTT, C. J.—I think the words of the statute are too strong for us to get over. They admit of no doubt whatever. The words are that “no appeal in any case relating to bastardy shall be *brought, received, or heard* at the said *Quarter Sessions* (i.e. the next *General Quarter Sessions* to be holden for the county,) unless such notice shall have been given, and such recognizance shall have been entered into.” It is clear therefore that the Sessions had no jurisdiction to enter or receive the appeal until proof was given of the notice and recognizance. Assuming the practice to be as stated (but which is denied on the other side) still a rule of practice at the Sessions cannot control the express words of the statute. The notice for the *Spalding Sessions* could be of no avail, because they were *adjourned Sessions*, and the statute requires the notice to be given for the *General Quarter*

(a) 1 Siderfin. 149.

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Sessions for the *county*. I am of opinion that this rule must be discharged.

BAYLEY, J.—The appellant having neglected what he was bound to do, this Court cannot relieve him. The Sessions had no jurisdiction to receive the appeal until the notice was given.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule discharged.

Monday,
22d Nov.

DAVIES, *qui tam*, v. BINT and others.

A *qui tam* information for penalties under the game laws is not an information within the meaning of the 48 G. S. c. 58. so as to entitle the plaintiff to enter an appearance and plea, when the defendant himself neglects to appear and plead.

THIS was a *qui tam* information against four defendants for penalties on the 5 Ann. c. 14. for using engines to destroy game. At the trial before Park, J. at the last *Worcestershire* Assizes, a verdict was found against three of the defendants and the fourth was acquitted.

Curwood on a former day obtained a rule nisi for setting aside the verdict on the ground of irregularity. The alleged irregularity was that the plaintiff had proceeded to trial before the cause was properly at issue, and before any notice of trial was given. On the 7th *May* last the plaintiff had served each of the defendants with a copy of the information, on which was indorsed a notice, "that unless, within eight days after the delivery thereof, he should cause an appearance and plea or demurrer to be entered in the Court of King's Bench to the information, an appearance and the plea of not guilty would be entered therto in his name, pursuant to the statute in that case made and provided, and the issue to be joined thereon would be tried at the then

next assizes to be holden in and for the county of *Worcester*." In consequence of the defendants neglecting to appear, and plead according to this notice, the plaintiff entered an appearance and plea of not guilty for each and took the record down to the assizes without any further notice of trial, and obtained a verdict as above mentioned. Now this proceeding seems to have been founded on the 48 *George 3.* cap. 58. under a supposition that that act extends to *qui tam* informations. But it is clear that the provisions of that act extend only to informations and indictments over which this Court has *exclusive* jurisdiction, and do not apply to informations on penal statutes, which are subject to the same rules and regulations as in other cases as to the plea and notice of trial. The whole proceeding in this case was irregular, and the verdict cannot be supported.

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The Court having granted a rule nisi.

W. E. Taunton and *Russell* now shewed cause. The question is, whether this case comes within the operation of the 48 *Geo. 3.* c. 58., for if it does, it is clear that no other notice of trial was necessary than was indorsed on the copies of the information, and that, in default of the defendants appearing and pleading, it was competent to the plaintiff to enter an appearance and a plea of the general issue, and so bring the case to trial. That statute provides, "that whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information in his Majesty's Court of King's Bench, and the same shall be made appear to any Judge of the same Court, by affidavit, or by certificate, of an indictment or information being filed against such person in the said Court for such offence, it shall be lawful for such Judge to issue his warrant,

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&c.; and for want of bail to commit the defendant to the gaol of the county where the offence shall have been committed, or where he shall have been apprehended, until he shall have been acquitted of such offence, or in case of conviction shall have received judgment for the same." It then enables the prosecutor of such indictment or information to cause a copy thereof to be delivered to such person or to the gaoler, &c. with notice to plead in eight days, and to cause an appearance and a plea or demurrer to be entered in the said Court to such indictment or information, and then if he neglects to cause an appearance and a plea or demurrer to be entered to such indictment or information, the prosecutor is empowered to enter an appearance and a plea of not guilty for him. Now the question is, whether an information for penalties, for offences committed against the game laws, is an information within the meaning of this statute. It is clear that such an information comes within the words of the statute, because the words are, "indictment or *information*." These defendants are also charged with an *offence* which they have committed, and, therefore, the case comes within another term used in the statute. It is clear that by the 13 Ric. 2. c. 13. the offence with which these defendants are charged, might have been prosecuted by indictment or information. By that statute, unqualified persons who shall use ferrets, heys, nets, and other engines for the destruction of game, are liable to one year's imprisonment. The only difference between that statute and the 5 Ann. c. 14. is, that in the latter, different and more extended provisions are introduced, but still both statutes, having the same object in view, must be taken together, and construed in *pari materia*. Most undoubtedly, in this particular case, the defendants might have been proceeded against upon the 13 Ric. 2. By the 5 Ann. c. 14. s. 4., persons using

engines to destroy game, in default of paying the penalty thereby imposed, shall be sent to the house of correction for three months for the first offence, and four months for every other such offence. So that in both these statutes, the act which is to subject the party to penalty or punishment is called an *offence*. Again, the 8 Geo. 1. c. 14. speaks of *convictions, informations and prosecutions for offences* against the game laws. In 4 Bl. Com. 308. it is stated, "that such informations as are usually brought upon penal statutes, are informations partly at the suit of the king, and partly at that of a subject, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer, and are a sort of *qui tam* actions, only carried on by a criminal instead of a civil process." The same distinction is taken as to informations by Mr. Sergeant *Hawkins's Pleas of the Crown* (a). In sect. 64. of that work it is said, that the king may totally bar the penalty by a pardon or a release precedent to the commencement of the suit, and again in sec. 67. it is said that the plea is not guilty, and, "if there be more than one defendant they ought not to plead jointly that they are not guilty, but severally that neither they nor any of them are guilty, &c." In all these statutes for preventing the destruction of game, the judgment always is, that the king or the informer shall recover, or that the defendant shall forfeit the sum mentioned by the particular statute. Here then are all the indicia necessary to bring this case within the terms, as well as the meaning of the statute 48 Geo. 3. c. 58. It is to be observed that the only offences excepted by that statute are felony and treason, and they are expressly excepted. The preamble recites that the provisions of the 26 Geo. 3. cap. 77. and the 35 Geo. 3. cap. 96., which were passed

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(a) Curwood's *Hawkins's P. C.* lib. 2. c. 26.

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to amend the law with respect to the course of proceeding on indictments and informations in the Court of King's Bench for offences against the revenue laws, and for offences against the quarantine laws, had been found beneficial, and that it was expedient to extend the same provisions to other cases. This then being an information for an offence committed against the game laws, the case comes within the terms as well as within the reason and principle of the statute, and consequently there was no irregularity in the proceedings.

Curwood and *Carrington*, contra, were stopped by the Court.

ABBOTT, C. J.—I am clearly of opinion, that the 48 Geo. 3. does not extend to informations on penal statutes. The proceeding here is for penalties. It is not a *prosecution by indictment or information*, which are the words of the statute, and clearly mean prosecutions by indictment or information in his Majesty's Court of King's Bench, that is, in cases where this Court has an exclusive jurisdiction by indictment or information. Therefore, when the statute mentions offences, "which may be prosecuted by indictment or information in his Majesty's Court of King's Bench," those words cannot be extended to offences against penal statutes, which may be prosecuted in any other Court. By this statute a Judge of this Court may issue his warrant against the party, and for want of bail may commit him to the county gaol. But surely it never was thought, that this act would empower a Judge upon an information on a penal statute, to cause the defendant to give sureties for his appearance, and then for want of sureties, to issue his warrant and commit him until the result of the information should be ascertained. Such a power was never yet thought of as being vested in the Judges of

this Court, and I know what the answer would be to such an application. Really the matter is too plain for argument.

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BAYLEY, J.—I am of opinion that the 48 Geo. 3. applies only to offences over which this Court has exclusive jurisdiction by indictment or information. It enacts in terms that “whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information *in his Majesty’s Court of King’s Bench*, and the same shall be made appear, &c.” that clearly imports offences over which this Court has exclusive jurisdiction by indictment or information at the instance of the king. Now this Court has not exclusive jurisdiction over informations on the game laws for penalties, because such informations may be brought in any of the Courts of *Westminster Hall*. The information in question might have been brought in any of the other Courts, and, therefore, the case does not come either within the terms or the spirit of the act of parliament.

HOLROYD, J.—I am of the same opinion. When the game laws speak of the *offence* and the *conviction*, they mean the *offences* and convictions therein described. Those words are not to be taken in the general sense in which they are applied to the cases mentioned in the statute in question. The same observation applies to the use of the words indictment or information. I never heard of an indictment in a case of this kind. It is perfectly clear that the 48 Geo. 3. has reference only to such offences as the King’s Bench may exclusively entertain, when prosecuted by indictment or information at the suit of the king.

LITTLEDALE, J. concurred.

Rule absolute.



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Friday,
26th Nov.

Where by a local act the guardians of the poor of the town of *Kingston upon Hull* were authorized to levy rates "by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriation of tithes and all stocks and estates in the said town, in equal proportions according to their respective worths and values:"—
Held, that under this act, all personal property, including shipping, was rateable, whether the owners were or were not resident within the town.

The KING v. The HULL DOCK COMPANY.

THE Hull Dock Company having been rated to the relief of the poor of the town of *Kingston upon Hull*, in respect of their profits arising from dock dues and wharfage rates, the sessions on appeal amended the rate by inserting the names of certain persons therein, who had been improperly omitted; and the rate so amended was confirmed, subject to the opinion of this Court upon a case.

At the sessions it was not disputed that the rate was duly made, but it was insisted on the part of the appellants that certain persons whose names were mentioned in the case, ought to have been assessed in respect of property after mentioned, and that they had been improperly omitted from the rate, and also that a deduction ought to have been made from the sum upon which the Dock Company were assessed, in respect to the amount of the poor rate with which they were chargeable. By an act of the 9 and 10 W. 3. the poor of the parish of the *Holy Trinity* and *St. Mary*, which parishes comprehend the whole of the town of *Kingston upon Hull*, and the precinct of *Myton* adjoining and belonging thereto, are placed under the management of a corporation created by the act, and called by the name of "the governor, deputy governor, assistants, and guardians of the poor in the town of *Kingston upon Hull*." After empowering the said corporation to erect work-houses,

If the ground of appeal against a poor's rate be, that certain rateable property has been altogether omitted, the onus does not lie upon the appellant to give the sessions the means of amending the rate, it being the duty of the parish officers to include all rateable property in the rate, and take what means they can to ascertain its value.

A landlord cannot be rated to the poor in respect of houses let to tenants, who have been excused their rates on the ground of poverty.

A rate upon the *Hull Dock Company* to the full amount of their profits, without regard to the amount of poor rates, with which they are chargeable, is bad.

&c. for the reception of poor and impotent persons, that statute proceeds to enact, "That it shall and may be lawful for the said corporation, from time to time, to set down and ascertain what weekly, monthly, or other sums shall be needful for the maintenance of the poor in the said hospital, or hospitals, workhouse, or workhouses, house, or houses of correction, or within the care of the said corporation, so that the same do not exceed what hath been paid in the said town towards the maintenance of the poor thereof in any one of the three last years, and so as such poor of the said respective parishes in the said town, as are unable to work, or get their living, be weekly provided for thereout; to the intent that no other levy or assessment may be made for any other maintenance or allowance to any of the poor of the said respective parishes, or any of them, upon the said inhabitants; and shall and may under their common seal certify the same unto the mayor, recorder, and aldermen of the said town for the time being. Which said mayor, and any six of the aldermen, or any eight of the aldermen without the mayor, may, and are hereby required, from time to time, to cause the same to be raised and levied by taxation *of every inhabitant, and of all lands, houses, tithes impropriate, appropriation of tithes, and all stocks and estates*, in the said town, and the lordship of *Myton* adjoining and belonging to the said town, in equal proportions according to their respective worths and values; and in order thereunto the said mayor and any six of the said aldermen, or any eight of the said aldermen without the mayor, shall have power, and are hereby required indifferently to proportion out the said sum and sums upon each parish and precinct within the said town, and by their warrants under the hands and seals of the major part of them to authorize and require the churchwardens and overseers of the poor


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of each respective parish and precinct to assess the same respectively, and after such assessments made and returned, the said mayor and six aldermen, or any eight of the aldermen without the mayor, are hereby empowered to approve, confirm, or alter such assessments, as to them shall seem just and reasonable, and the said assessments by warrants under their heads and seals to authorize the said churchwardens and overseers to demand, gather, and receive." By virtue of this statute, in the month of *July*, 1823, the mayor and aldermen issued their warrants to the proper officers of the several wards into which the town of *Hull* is divided, and also of the precincts of *Myton*, authorizing and requiring them to make assessments within their respective wards and precincts upon every inhabitant, and upon all lands, houses, tithes impropriate, appropriation of tithes, and all *stocks and estates* within the same. The Hull Dock Company having been assessed under the authority of these warrants, appealed against the assessments, on the ground that certain classes of persons who ought to have been rated had been omitted, namely, first, persons who did not reside in *Hull*, but had either shops or counting houses there, and having stocks in trade, of which a clear profit had been made during the preceding year; second, a lessee of houses who underlet the same at an improved rent, the occupiers of which had been rated, but excused from payment of the rates on the ground of poverty; third, owners and part owners of ships registered in the port of *Hull*, which usually traded to and from the port, and were within the town at the time when the rate was made. Some of these owners and part owners of ships resided within the town and others did not, but had counting houses there, and others were neither resident nor did they occupy counting houses in the town. It was stated, however, that the ships had made several



voyages from and to *Hull* during the preceding year, and that the owners made a profit thereof respectively, but the particular amounts of such profits were not stated. And fourth, persons who had stock in trade deriving profit therefrom and residing in the ward for which the rate was made. It being admitted by the respondents at the hearing of the appeal that these last mentioned persons ought to have been included in the rate, the sessions ordered the rate to be amended, by inserting the names of those persons therein; but they reserved for the opinion of this Court the question, whether the three classes of persons above mentioned ought to have been included in the assessment. The appellants had been assessed in respect of the profits arising from the dock dues and wharfage rates received by them. The case stated, that their net profits for the year amounted to 8900*l.* after making a fair allowance in respect of repairs and all other expenses incidental to, and necessary for making the property profitable, but without making any deduction in respect of the sum with which they were chargeable to the poor rate, and which according to the assessment in question amounted to 2225*l.* If the amount with which they were so chargeable as poor rate ought to have been deducted, then their net profits would amount only to 6675*l.* or thereabouts. The Dock Company were assessed as upon profits amounting to 8900*l.* and not as upon profits amounting to 6675*l.* only; no deduction being allowed in respect of the poor's rate. The question for the opinion of the Court is, whether under the circumstances set forth in the case, the order of sessions can be supported.

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Marryat and *Coltman* in support of the order of Sessions. The question is whether the 9 and 10 *W. 3.* by which the management of the poor of *Hull* is regulated

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is, to receive a different construction from the 43 *Eliz.* c. 2. It is true, that there is some variation in the language of the former from the latter, but still as both were made in *pari materia* it is submitted that they ought to receive the same construction. If that be so, then it is clear, first, that the owners of personal property not resident within the town of *Hull* are not rateable. In Sir *Anthony Earby's* case (a) it was held so early as the 9 *Car.* 1. that the owners of personal property are not rateable under the 43 *Eliz.* unless they are resident within the parish where the property lies, and that construction of the statute has never since been disputed. Two things are requisite to make personal property rateable, first, that the owner must be resident in the parish, and second, that the property must produce a profit, and if either of these circumstances is wanting the rate will be bad. It must be conceded that the words "stocks and estates" in the 8 and 9 *W. 3.* mean personal property; but inasmuch as the owners of the stocks in trade mentioned in the case were not resident in *Hull*, the persons comprized in that class were properly omitted from the rate. Then as to the second class there is no pretence for rating the lessee of houses on the ground of the inability of his tenants to pay the rates. The rate is in all cases imposed upon the actual occupier of the property, and it was never yet heard of, that a landlord was liable to pay the poor's rates because of the poverty of his tenant. The landlord can in no sense be considered as the occupier within the meaning of the statute of *Elizabeth*, so long as there is a tenant in possession. There is nothing in the 9 and 10 *W. 3.* to vary that universal rule of law, and according to Sir *Anthony Earby's* case, the occupier, and not the landlord, is to be rated. Then as to the third class of persons alleged to have been improperly omitted

(a) 2 *Bulst.* 354.



from the rate, it must be admitted that ships are rateable property (a), but in this case, though some of the owners and part owners are stated to be resident in the town of *Hull*, yet there is nothing to shew that those persons derive any profit from property of that description. There is no statement in the case as to what shares belonged to the resident part owners, and on the other hand, the case does state that the amount of their profits was not shewn. According to the cases of *Rex v. Topham* (b), and *Rex v. Ringswood* (c), it was incumbent on the appellants, not only to shew that rateable property was omitted, but also the amount at which it should have been rated. Undoubtedly it was the duty of the sessions to amend the rate if it was improperly made, but if the appellant does not furnish them with data upon which the amendment is to take place, no obligation of that kind is imposed. Here the appellants produced no evidence to shew what profits arose from the property which was alleged to have been improperly omitted from the rate, and consequently the sessions could do no more than they have done (d). Then lastly, there is no objection to the amount at which the Dock Company have been rated. Their net profits for the year are stated to have amounted to 8900*l.* and upon that sum they were clearly rateable without any deduction in respect of the sum with which they are chargeable to the poor rate. They are assessed upon their profits, and according to the amount of those profits, they are rateable. This was the principle acted upon in *Rowls v. Gell* (e) and *Rex v. Agar* (f), and in those cases no claim was allowed in respect of the poor rate for which the defendants were respectively rated. On these grounds the order of sessions must be confirmed.

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(a) *Rex v. White*, 4 T. R. 771.

(b) 12 East, 546.


(c) Cowp. 326.

(d) *Rex v. Ambleside*, 12 East, 546.

(e) Cowp. 451.

(f) 14 East, 256.

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Scarlett, Tindal, and Archbold contra. The statute 9 and 10 *W. 3.* cannot be construed in *pari materia* with the 43 *Eliz. c. 2.* unless the preamble of the former discloses something expressive of such an intention on the part of the legislature. Now no such intention is expressed. The 9 and 10 *W. 3.* therefore must receive a construction conformable to its own peculiar language, as applicable to the regulation and management of the poor of this particular town. The language of the two statutes is mainly distinguishable. In the statute of *Elizabeth* there is no mention made of personal property, whereas in 9 and 10 *W. 3.* "*stocks and estates*" are expressly mentioned in terms. It is not disputed that under the statute of *Elizabeth*, personal property is not rateable, unless the party is personally resident in the parish where it lies; but in this case the statute of *William* says nothing about inhabitancy or residence, and in express terms makes personal property rateable. The rates are to be levied by taxation of "every inhabitant, and of all lands, tithes impropriate, appropriation of tithes, and *all stocks and estates* in the said town, &c." Therefore personal property is as much rateable whether the person resides in the town or out of it. The only question is whether the property does or does not yield a profit to the owner. In the construction of this statute his residence is quite out of the question. Suppose a person derives a profit of 10,000*l.* a year from his stock in trade in the town of *Hull*, could he relieve himself from liability to the rate on the ground that he did not personally reside in the town? Surely not. Therefore upon the just exposition of this statute it is clear that the owners of stocks in the town are rateable whether they be or be not resident. [*Abbott, C. J.* We are all of opinion that we must construe this local act of parliament by itself. It may very possibly have happened that

when an act of parliament was passed which was to legislate for this particular town of *Hull*, the legislature would take into consideration the circumstances of the place, the nature of the occupation, and the description of the inhabitants, and would adapt their language accordingly, so as to make property rateable in that particular town, which would not be rateable by the general law of the land.] Then as to the second class of cases, there seems no good reason why the landlord of the houses should not be rated if the tenants are from their poverty excused. If the landlord by the rent he demands absorbs the tenants means of paying the rate, it seems but just and equitable, that he should contribute to the burthens of the parish in common with other parishioners. The practice of letting houses to poor tenants has a natural tendency to increase pauperism, and throw an unequal burthen upon those persons who are enabled to pay their rates. If, therefore, a landlord thinks proper to let his houses to a class of persons who are only able to pay his rent, it is fit that he should be made liable to pay those rates which his tenants might be able to pay but for the amount of rent demanded. [*Abbott, C. J.* If the principle is established, that landlords are liable to be rated in consequence of the inability of their tenants to pay rates, it will have the effect of depriving poor persons of their habitations, for no landlord will let small tenements to persons of that description, if they are to be liable as sureties for their tenants. That will be the result, if such a principle were established.] It certainly seems reasonable that both landlord and tenant should be included in the rate, although there may be a difficulty in establishing the liability of the landlord. Then with respect to the objection that the owners of ships have not been included in the rate, that has received no satisfactory answer. It may not be a very easy matter, perhaps, to

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ascertain the amount of profit arising from such property, but that is no reason for omitting the ship owners altogether. If it appeared that such persons had been omitted improperly, the sessions ought to have quashed the rate and were certainly not bound to amend it. It is said on the other side, that the onus lies upon the appellant to furnish the sessions with the materials for amending the rate in this particular. It would however be a most unreasonable as well as impracticable duty imposed upon the appellants if they were required to prove at how much each of a very large class of persons ought to have been rated. With respect to the deduction claimed by the Dock Company in respect of the sum at which their net profits is rated, it is perfectly clear that the Company have been rated too high. The criterion of their rateability is the sum which the docks would bring them if they were let to a tenant. Now the annual value of land is made up of the rent and the outgoings, of which the poor rate forms a considerable proportion, and it is the universal practice not to rate land at the rack rent but according to the rent, minus the poor rate. Upon this principle therefore, the profits of these docks, can only be rated upon the net profits after deducting the poor rate.

*Cur. adv. vult.*

On this day the judgment of the Court was delivered by

ABBOTT, C.-J.—This was an appeal against a rate upon the *Hull Dock Company* for the relief of the poor of the parishes of the *Holy Trinity* and *St. Mary*, and the precinct of *Myton*, adjoining and belonging to the town of *Hull*. The grounds of appeal were that some persons were improperly omitted, and that a deduction should have been made from the sum at which the

Company were rated, to the extent of the poor rate they were compellable to pay. The poor rate in *Hull* is raised under an act of the 9 and 10 *W. 3.* which directs that it shall be levied "by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriations of tithes, and all stocks and estates, according to their respective worths and values." The cases of persons improperly omitted were reduced to certain classes, namely, first, persons residing out of *Hull* but occupying counting houses or shops within the town of *Hull*, and having stock in trade by which they made a specified profit; secondly, owners or part owners of ships registered at the port of *Hull*, and trading to and from it, and making profit yearly, though the amounts of such profit did not appear, such owners being in some instances resident in *Hull*, and in others non resident; and thirdly, a lessee of houses, underlet by him at an advanced rent to persons who were rated, but on account of their poverty were excused from paying their rates; and if any one of these three classes was improperly omitted the rate was wrong pro tanto. The rate had originally omitted certain other persons resident in *Hull*, and having stock in trade there yielding profit; but it was conceded at the sessions that those persons ought to be added to the rate, and they were added accordingly. The case therefore is confined to the three sets of cases I have mentioned, which were omitted, and we are of opinion that the first and second classes were liable to be rated and were improperly omitted, but that the lessee in the third case was not liable, and that the omission as to him was perfectly correct. It was urged upon the argument that although the local act 9 and 10 *W. 3.* used different language from the 43 *Eliz. c. 2.* yet that it ought to be construed as if the language in both had been the same, but we intimated our opinion to the contrary in the progress of the discus-

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sion, and we see no reason upon further consideration for changing that opinion. The 43 *Eliz. c. 2.* uses language applicable to the kingdom in general. The 9 and 10 *W. 3.* having in its view the town of *Hull* only, would naturally suit its expressions to the state and circumstances of that place, and when we find a deviation from the language used in the statute of *Elizabeth* the presumption is, that the deviation was intended, and that a different system was thought better for *Hull*, and that the language proper for such system was consequently used. We are therefore to consider it as the intention of the legislature in passing the 9 and 10 *W. 3.* that the rate should be raised by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriations of tithes, and all stocks and estates within the town. It was properly admitted by Mr. *Coltman* in argument, that stocks and estates must include all stock in trade and personal property. Indeed the word "stocks" could have no other meaning, and "estates" placed as it is in the clause must extend to personal estates. This statute therefore has these two effective words which are not to be found in the statute of *Elizabeth*, and these two words remove from this case all distinction between residents and non-residents. Under the statute of *Elizabeth*, there was no word applicable to personal property, and it was only on the ground of his being an inhabitant that any owner of personal property could be rated for that property, because there was no word in that statute to include him, except the word "inhabitant." Upon the construction of that statute therefore there was necessarily a distinction between a residence and non-residence, because the resident would be rateable for his personal property within the place, whereas the non resident would not. The distinction however under that statute applied only to those kinds of property which the statute did not specify, for

the occupiers of lands, houses, &c. and whatever the statute enumerated was rateable, whether he was resident or not. In the 9 and 10 *W. 3.* what was defective in this respect in the statute of *Elizabeth* is supplied. The rate is not only to be upon every inhabitant, but upon all stocks and estates. Lands, houses, and tithes are all rateable according to the general principles of rating, whether the occupier be resident or not, and it is impossible upon this act to say that lands within the town shall be rated, but that stocks and personal property shall not. The stocks and personal property are not rateable elsewhere, but as they have all the benefit of the town, there can be no reason why, when there are words sufficient to include them, they should not be included. We are therefore of opinion that the stock in trade and ships yielding profit are liable to be rated. It was pressed upon us in argument that as the appellants had not made out what was each ship's profit, they had not given to the sessions the means of amending the rate, and that the appeal therefore as to the ships could not be supported; but besides that, this is evading the question which was obviously sent for the opinion of the Court, it is founded upon a misapprehension of the duties of the parish officers, and of an appellant. Where property is rateable it is the duty of the officers to include it in the rate, and to take what means they can to ascertain its value. It is not for them to omit it altogether and to cast upon the appellant what is properly their duty, the burthen of proving its value. In the case of a single omission the difficulty upon the appellant might not be very great, but where all the property of a given description is omitted, the difficulty might be excessive. Before the passing of the 41 *Geo. 3. c. 23.* the omission of a single individual who ought to have been included, compelled the sessions to quash the whole rate, and so as he was rateable at all,

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the extent to which he was rateable did not come in question. That statute however requires the sessions to amend or alter a rate appealed against without quashing it, but with this proviso, that if the sessions shall think it necessary for the purpose of giving relief to the appellant to quash the rate, they may do so, and when any rate contains so many omissions that it can hardly be expected of an appellant that he should have evidence to shew the extent to which each person omitted ought to be rated, and where the investigation before the sessions would be likely to exhaust more time than they could reasonably be required to give up, we think it would not be an improper exercise of their discretion to quash the rate, and make the officers of the parish do in the end what they ought to have done at the beginning. As to the question of the lessee whose under tenants have been excused from poverty, the point was not very much pressed upon our consideration in the argument, and we think the lessee not liable. The 9 and 10 W. 3. imposes the rate indeed upon the lands, houses, &c. without mentioning either occupier or owner, but as this is a burthen commonly falling on the occupier, and rarely imposed upon the owner, we think the owner not compellable to bear it. The owner fixes his rent upon the supposition that this is his tenant's burthen, and without very clear words to shew that such was the intention, we think we cannot make the landlord surety for the tenant. As to the question whether the rate upon the company should be according to the full amount of their profits without making any deduction for the sum they are liable to pay for poor rate, we think the rate ought not to be so made. This property is to be charged according to its worth and value, in like manner and in the same proportion as other real property is charged in the same rate. If other real property is charged only at three

fourths, or any part of its value, after making deductions of the same nature which have been made in the case of the company, the company ought to be charged in the same proportion. If other real property is charged according to the rack rent actually paid by the occupier, and according to a rent so estimated where the occupier is not a tenant, at such rent there will even in those cases be a virtual allowance in respect of the poor rate, such a rent being in reality a part only of the worth or value of the land. The whole worth or value is made up of what is paid in rent, and what in rates and other outgoings. Land intrinsically worth forty pounds a year can only pay a rent of thirty pounds, if it is to pay 10*l.* per annum in other ways; and in estimating a rent, both landlord and tenant look to the value of the thing on the one hand, and to the outgoings on the other, and the outgoings must be deducted from the value before the rent can properly be fixed. Whenever, therefore, the rate is according to the rent, which is generally the case, an allowance is virtually made for the poor rate; and if this rate is made according to the rent the company should have that allowance. The mode of estimating the allowance is a very different thing. That which is suggested in the case is clearly wrong, for if 2225*l.*, the present rate, is deducted from the 8900*l.*, the rate upon 6675*l.* only will have part of the rateable proportion of 8900*l.* free from rate. The allowance must be so made that the sum upon which the annual rates are made may with the amount of the rates make up the 8900*l.* This sum, according to the present rate, will be 7120*l.* and the sum to be paid by the company will be 1780*l.* The process of calculation must be adapted to the amount of the rate. It is sufficient for us to propound the rule, leaving the process of calculation to others. Upon the whole, therefore, all the persons

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omitted, except the lessee of houses underlet by him, must be put upon the rate; the rate payable by the Dock Company must be reduced to 1780*l.* and the case must be sent down to the sessions, that they may introduce the proper sums if they find it practicable, or that they may quash the rate if it be not.

Order of sessions quashed.

*Saturday,*  
*27th Nov.*

**The KING v. TREMAINE.**

Where a Judge at the assizes refused to try an indictment for a misdemeanor, manifestly bad on the face of it, but did not order it to be quashed, and the prosecutor preferred another indictment for the same offence, and removed it into K. B., the Court would not call upon the prosecutor to pay the costs of the first prosecution, before he proceeded with the second.

ON the last Western Circuit the defendant had been indicted on the crown side for a misdemeanor. When the case was called on for trial, *Garrow*, B. refused to try it, the indictment being manifestly defective in form, but the learned Judge did not order it to be quashed. The prosecutor then preferred a second indictment for the same alleged offence, and having removed it into this Court by certiorari,

*Carter* now moved for a rule, calling on the prosecutor to shew cause why he should not pay the defendant his costs incurred by the first prosecution, before he was permitted to proceed with the second. It is an established rule in this Court, that where a first indictment is quashed the Court will not allow the prosecutor to prefer a second for the same offence, but on the condition of paying the costs of the first. Here undoubtedly the first indictment was not quashed, and it still remained on the file, but as the learned Judge had refused to try it because it was so defective that it could not be supported for a moment, the case comes within the spirit of the rule, where the first indictment is in fact quashed. No express decision can be found on the point.

ABBOTT, C. J.—Unless some instance can be found in which such an application has been granted under similar circumstances, I think we ought not to establish a precedent.

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PER CUR.

Rule refused.

## The KING v. TUCKER.

**BARNARD**, on a former day in this Term, obtained a rule calling upon the defendant to shew cause why a writ of mandamus, issued in *Easter* Term last, directed to the Justices of the county of *Somerset*, commanding them to hear an appeal against the decision of the Special Petty Sessions for the hundred of *Winterstoke*, upon an application made by *Tucker* for a compensation in damages under the 3 *Geo.* 4. c. 33. should not be quashed, quia improvidè emanavit. The case disclosed on affidavits was this :—On the 4th *November*, 1823, two ricks of corn, the property of Mr. *Tucker*, were wilfully consumed by fire in the hundred of *Winterstoke*, by some person or persons unknown. The value of the ricks was estimated at 30*l.*, and in consequence of this injury he proceeded under the statute 3 *Geo.* 4. c. 33. (a), an act entitled “An Act for altering and amending several acts passed in the

*Monday,*  
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The 3 *Geo.* 4. c. 33. s. 2. gives a summary remedy, to the extent of 30*l.* against the hundred, for injuries done to property by riotous assemblies, on application to the Petty Sessions in the manner therein prescribed; and by s. 7. an appeal lies to the Quarter Sessions when persons are aggrieved by any thing done in pursuance of the act.

Where the Petty Sessions, under a mistake of the law, and not upon the merits of the case, dismissed an application under this statute :—

(a) By sect. 2. of which it is enacted, “That where the loss, injury or damage, claimed or alleged to have been sustained, shall not exceed in amount the sum of 30*l.*, it shall and may be lawful for the party or parties damnified or injured, and he, she, and they, are hereby directed, within one calendar month next after such damage or injury shall have been sustained, to give notice in writing to the high constable of the hundred, &c. in which such loss, injury, or damage, shall have been suffered or sustained, of such riotous or tumultuous

Held, that the Quarter Sessions might entertain an appeal against their determination. Service of a rule nisi for a mandamus to the Sessions to hear an appeal against the determination of the Petty Sessions, need not be upon the clerk of the peace; it is sufficient if it be served on the Justices whose decision is complained against.

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first and ninth years of the reign of King *George the First*, and in the forty-first, fifty-second, fifty-sixth, and fifty-seventh years of the reign of his late Majesty, King *George the Third*, so far as the same relate to the recovery of damages committed by riotous and tumultuous assemblies and unlawful and malicious offenders;" and gave the notice to the high constable thereby required, and, in pursuance of such notice, on the 9th *December* following, a Special Petty Session was holden by three justices acting for the hundred of *Winterstoke*, to hear and determine his complaint. After hearing the circumstances under which the fire took place, the justices, conceiving that it was necessary to prove that the persons who committed the injury were engaged in a riot or tumultuous assembly, or that they were armed with swords, firearms, or other offensive weapons, or had their faces blacked, or were otherwise disguised, and no such proof being given, dismissed the complaint. Whereupon Mr. *Tucker*, in pursuance of the 7th (a) section of

assembly having taken place, and the nature and amount of the loss, injury, or damage sustained, and of his, her, and their intention of calling upon the inhabitants of such hundred, &c. to make good such loss, injury, or damage; and the said high constable is forthwith to give notice in writing thereof to the magistrates residing in or acting for such hundred, &c., who shall thereupon appoint a Special Petty Session, to be holden within thirty days next after the receipt of such notice, of all the magistrates residing in or acting for such hundred, &c. to hear and determine of any complaint which may be then and there brought before them for or on account of any such damage or injury having been sustained by or through the means aforesaid; and the party or parties so damnified and injured, is, and are, hereby directed to give notice, or cause a notice in writing to be placed on the church or chapel doors, or most conspicuous place, of the parish, township, or place, in which such loss, injury, or damage, shall have been sustained, on two successive *Sundays* next preceding the day of holding such Petty Session, of the intent and purpose for which such Special Petty Session is to be held."

(a) By which it is enacted, "That if any person or persons in *England* shall think himself, herself, or themselves, aggrieved by any

the statute, entered an appeal at the *Epiphany* General Quarter Sessions holden for the county on the 12th *January* following. When the appeal came on to be heard, the Justices refused to entertain it, on the ground that nothing had been *done* by the Petty Sessions, in pursuance of the act, against which an appeal would lie, so as to give the Quarter Sessions jurisdiction, and therefore the appeal was dismissed. In *Easter* Term Mr. *Tucker* obtained a rule calling upon the *Somersetshire* Justices to shew cause why a mandamus should not issue commanding them to hear the appeal, upon notice of that rule to be given to the said Justices or some of them. On the last day of *Easter* Term the rule was made absolute, on an affidavit of service upon those Justices alone who had originally heard the complaint at the Special Petty Sessions, and upon the high constable of the hundred, and no cause being shewn, a mandamus was ordered to go, and the writ was served upon the same Justices only. When the appeal was presented for hearing at the *Midsummer* Quarter Sessions, the Justices then assembled refused to hear it, on an objection taken by the respondents' counsel that the rule nisi for the mandamus had been improperly served, not having been served upon more of the county Justices. Now, on shewing cause against the rule for quashing the writ of mandamus on the ground that it had been improvidently issued, two questions were raised; first, whether the General Quarter Sessions had jurisdiction to entertain an appeal under the 3 *Geo.* 4. c. 33. where the Petty Sessions had done nothing in pursuance of that act; and, second, whether the rule nisi for the mandamus had been properly served.

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*C. F. Williams* shewed cause. It is clear that the

thing done in pursuance of this act, such person or persons may appeal to the Justices of the Peace at their next General Quarter Sessions of the Peace to be holden for such county."



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Justices at the Special Petty Session, having mistaken their jurisdiction, their refusal to hear the complaint must be considered such a grievance to the party complaining of an injury for which the statute provided relief, as would give the Quarter Sessions jurisdiction to hear an appeal as for a thing done in pursuance of the act. If the Court shall not put this construction upon the statute, the party must be deprived of all remedy, because his complaint will be out of time. The statute contains very peculiar provisions. It requires that the party damaged shall give his notice within one calendar month next after the injury has been sustained, and the Petty Sessions are to be holden within thirty days next after the receipt of such notice, to hear and determine the complaint. Unless, therefore, the Quarter Sessions are bound to hear the appeal against the refusal of the Petty Sessions to entertain the complaint, the party will be deprived of all remedy. On this ground the mandamus had properly issued. It may be true, as was said at Sessions, that the Justices had no original jurisdiction, but still they are empowered to remedy the grievance sustained in consequence of the mistake of the Petty Sessions. Then the only question is, whether the rule nisi for the mandamus was duly served. The rule nisi required that notice thereof should be given to the county Justices *or some of them*. Now that condition was fully complied with by serving it on the Justices composing the Petty Sessions, they being county Justices, and in fact the parties of whose proceedings complaint was made. It was also served on the high constable, who represented the hundred, and, therefore, due notice was given to every necessary party interested in shewing cause, if any could be shewn. It would be unreasonable to expect a service of notice upon all the Justices of the county, and the service in this instance was in conformity with the usual practice in the Crown Office.

y, on the same side, was stopped by the Court.

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ard, in support of the rule. The Quarter Sessions have no jurisdiction to hear an appeal under this act, the party has been aggrieved by something *done in pursuance of* the act. Now it would be an anomaly that the Petty Sessions have *done* any thing *in pursuance of* the act, when in fact they have refused to do any thing whatever. It is true that they heard the complaint being of opinion that the party had not brought the matter within the remedy of the statute, they refused to make any order upon the subject, and dismissed the complaint. There was, therefore, nothing *done in pursuance of* the act which could give the Quarter Sessions jurisdiction to hear an appeal. It cannot be said that the dismissal of the complaint was an act done within the intent and meaning of the statute, for it would be a contradiction to say, that they were acting in pursuance of the statute when they refused to do any thing whatever under an application to the Quarter Sessions to hear what was an appeal, was more in the nature of an application to exercise an original jurisdiction, than to set right any thing which had been improperly done by the Petty Sessions in pursuance of the statute. It is clear that the Quarter Sessions had no more a right to exercise original jurisdiction in this case than they had to make a poor-rate, an order of removal under the poor law, or an original order of filiation in a matter of bastardy. Theirs is only an appellate jurisdiction, to hear an appeal against something erroneously done by the Petty Sessions below. Here there was nothing to appeal against and it might as well be said that they could entertain an appeal against the refusal of Justices to impose a fine, under a penal statute, at the suit of an individual. The question is, whether any act has been *done in pursuance of* the statute; for if nothing has been done,

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then the Sessions have no appellate jurisdiction. But, independently of this objection, the rule nisi for a mandamus having been improperly served, it ought not to have been made absolute, and therefore must be quashed on that ground. [*Abbott, C.J.* Upon whom do you say it ought to be served?] Upon the clerk of the peace, certainly. [*Abbott, C.J.* That had occurred to me to be requisite, but I find from the officers of the crown side that the practice is otherwise.—*Bayley, J.* According to the terms of the rule the notice is to be given to the Justices or some of them. Now here the service is upon the Justices who originally sat in Petty Sessions.] But that is a service upon parties who are utterly incompetent to act, because they are the persons against whose proceedings the mandamus is directed. [*Abbott, C.J.* I understand, from the officers on the crown side, that it is the common and constant course of practice to serve the rule nisi upon the particular magistrates whose act is complained of, and that it is not the practice to serve the rule on the clerk of the peace.—*Bayley, J.* Service upon the magistrates who were assembled at the Petty Sessions, was, I think, quite sufficient.—*Abbott, C.J.* Besides, here the high constable is served, and he represents the interest of the hundred.]

ABBOTT, C.J.—I think we ought not to quash this writ. If it appears that the rule nisi for a mandamus has been served according to the usual course and practice of the Court, the Justices cannot complain that the writ has issued improperly. We are informed, by the officers on the crown side, that the service of the rule in this case has been according to the constant course in similar cases. At the same time, however, if it could be shewn that the writ had issued improperly, and commanded the Justices at Sessions to do something which by law they had no power to do, it would be the duty of the Court to

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quash it on the ground that it had been improvidently issued. Now it is very true, that in many cases if a Justice refuses to do a certain act, his refusal cannot be the ground of an appeal to the Sessions. For instance, if an application is made to Justices to make an order of filiation in a matter of bastardy, and they refuse to make it, their refusal cannot be made the ground of appeal. So with respect to orders of removal under the poor laws. But then in these cases a fresh application may be made to other justices, who may not refuse to act. Again, if there be a proceeding by information for a penalty under a statute, and the Justices, after hearing the matter, refuse to convict the party, that would be equivalent to an acquittal, and it is perfectly clear that no appeal will lie to the Quarter Sessions against an acquittal. But the authority given to the Justices under the 3 Geo. 4. c. 38. is one of a very peculiar and special nature. The party injured is within one month after the injury has been sustained, to give notice of the injury to the chief constable of the place, that he intends to call upon the inhabitants of the hundred to make good the loss. After the chief constable has received such notice, he is, on his part, to give a notice to the magistrates residing in, or acting for the hundred, who shall thereupon appoint a Special Petty Session, to be holden within thirty days next after the receipt of such last mentioned notice, of all the magistrates residing in, or acting for the hundred, to hear and determine the complaint, and the party injured is also to affix a notice on the church door on two successive *Sundays* next preceding the day of holding the Petty Session. The application, therefore, for relief, cannot be made to this or that justice, at the pleasure of the party, but must be made in such a manner as that all the justices acting for the division may assemble and decide, and the assemblage must be within thirty days after

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the high constable has received notice. If, therefore, the Justices in Petty Sessions dismiss the complaint, the party cannot renew his application for relief to other Justices, nor can this Court order a mandamus to the Special Petty Sessions. The question then is, whether, if the Justices at the Special Petty Sessions decide against the party complaining, not upon the merits of the case, but upon some opinion which they have formed of the law, which turns out to be erroneous, such determination or dismissal of the complaint is not an act done against which there may be an appeal under the 7th section of the statute. I think that it is so; but I wish it to be understood that our decision is founded on the special and peculiar provisions of this act of parliament, and is not to be drawn into a precedent in other cases of a general, and not of a peculiar nature, or where the circumstances are not similar, nor the law analogous. The ground of our decision is, that this was a dismissal of the complaint in consequence of a mistake of the law, and not a dismissal upon a hearing of the merits.

BAYLEY and HOLROYD, J.s (a), were of the same opinion.

It then became a question whether the rule should be discharged with or without costs, and *Barnard* having informed the Court that he was instructed on behalf of the hundred—

The rule was discharged with costs, and a peremptory mandamus was ordered to go.

(a) *Littledale*, J. was gone to chambers.



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## The KING v. JOSIAH TAYLOR.

Monday,  
November 29.

INDICTMENT charging that defendant, on the 20th day of *April*, in the second year of the reign of *our sovereign Lord George the Fourth*, &c. and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at &c. a certain common gaming house, for his lucre and gain, unlawfully and injuriously did keep and maintain, &c. Plea, in bar, that heretofore, to wit, at the General Quarter Session of the peace of *our Lord the King*, begun and holden at &c. on *Wednesday* the 15th day of *October*, in the fourth year of the reign of *our sovereign Lord George the Fourth*, &c. before &c. and continued &c. until *Monday* the 20th day of the same month of *October*, he, the said *J. T.* was duly arraigned upon a certain indictment before then, to wit, at the General Session of the peace of *our said Lord the King*, holden in &c. on *Monday* the 8th day of *September*, in the fourth year aforesaid, duly presented and found, &c. which charged that he, the said *J. T.* on the 18th day of *January*, in the 57th year of the reign of *our late sovereign Lord George the Third*, &c. and on divers other days and times between that day and the day of the taking of that inquisition, with force and arms, at &c. aforesaid, a certain common gaming house, for his lucre and gain, unlawfully and injuriously did keep and maintain, &c. *against the peace of our said Lord the King*, his crown and dignity. To which said indictment he, the said *J. T.* had before, to wit, at the preceding General Session of the peace of *our said Lord the King*, holden at &c. on *Monday* the 8th day of *September*, in the fourth year aforesaid, demurred, concluding with a prayer of judgment of respondeas ouster:—Held, first, that the plea was bad, because the indictment on which the acquittal was founded, charged an offence committed in the reign of the *late king*, and defendant could not by averment shew that the offence charged in both indictments was the same; and second, that the judgment on demurrer was final, although the demurrer concluded with a prayer of judgment of respondeas ouster. *Semble*, that every indictment for a misdemeanor must conclude *contra pacem*, &c.

Indictment, that defendant in the reign of the *present king* kept a common gaming house. Plea, that defendant in the reign of the *present king* was acquitted upon an indictment for keeping a common gaming house in the reign of the *late king*, against the peace of our *said lord the king*; and averring the identity of the offences. Demurrer, concluding with a prayer of judgment of respondeas ouster:—Held, first, that the plea was bad, because the indictment on which the acquittal was founded, charged an offence committed in the reign of the *late king*, and defendant could not by averment shew


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year aforesaid, pleaded that he was not guilty, upon which plea issue had been joined; and thereupon a jury of the country then and there, to wit, at the General Quarter Session of the peace of *our said Lord the King*, holden at &c. on *Monday* the 20th day of *October*, as aforesaid, duly chosen, &c. did then and there, upon their oath, say that the said *J. T.* was not guilty of the nuisance in the said indictment aforesaid above specified, upon which it was considered by the Court there, that the said *J. T.* of the premises aforesaid, in the said last mentioned indictment above specified, should be discharged and go without day, as appears by the record of the said proceedings now remaining in the said Court of General Quarter Session of the peace of *our said Lord the King*, &c. And the said *J. T.* further saith, that he, the said *J. T.* now here pleading, and the said *J. T.* in the aforesaid indictment named, and thereof acquitted as aforesaid, was and is the same identical person, and not other or different persons, and that the said nuisances and offences, in the said indictment, to which he, the said *J. T.* now here pleads, specified, and the supposed nuisances and offences specified in the said indictment of which he, the said *J. T.* was and is so acquitted as aforesaid, are the same supposed nuisances and offences, and not other or different nuisances and offences, to wit, at &c., and this he, the said *J. T.* is ready to verify: wherefore, &c. Demurrer to the plea, praying judgment of respondeas ouster, and joinder in demurrer. The case was argued at the Sittings after last *Trinity* Term.

*Chitty*, in support of the demurrer. There are several objections to this plea, but one of them in particular is so clearly fatal, that it will be sufficient, in the first instance, to direct the attention of the Court to that only. The indictment set out in the plea, and upon which the

supposed acquittal is founded, is one upon which no sentence could have been passed, because it charges the defendant with an offence committed in the reign of *George the Third*, and concludes against the peace of *George the Fourth*. Such an indictment cannot be supported, and therefore the plea in which it is set out is bad. In *Rex v. Lookup* (a), the question being put by the House of Lords to the twelve Judges, "whether the perjury being alleged in the indictment to have been committed in the time of the late king, and charged to be against the peace of the now king, was fatal, and rendered the indictment insufficient;" the Lord Chief Baron delivered the unanimous opinion of the Judges in the affirmative. That is a direct and decisive authority for the present case, and the same rule is laid down by Lord *Hale* (b), and Mr. Serjt. *Hawkins* (c). If the indictment was intended to cover offences committed in both reigns, it should have concluded against the peace of both kings: *Winter's case* (d), and *Inclendon v. Burgess* (e). Besides, it is plain that there are two distinct offences charged in the two indictments; for the first charges an offence committed in the reign of *George the Third*, and the present charges an offence committed in the reign of *George the Fourth*; they cannot therefore, by possibility, refer to one and the same offence. Lastly, the conclusion *contra pacem* cannot be treated as surplusage, for it is substance, and its omission altogether would be fatal: *Palfrey's case* (f), and *Leyton's case* (g).

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*Curwood, contra.* It may be admitted, that in a plea of *autrefois acquit* it is necessary to set out all that is

(a) 3 Burr. 1901.

(b) 2 Hale's P. C. 188, 9.

(c) *Curwood's Hawk*. P. C. b. 2. c. 25. s. 92.

(d) Yelv. 66.

(e) 2 Salk. 636.

(f) Cro. Jac. 527.

(g) Cro. Car. 584.



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essential to shew that the defendant was *legitimo modo acquietatus*; but that is all; and therefore, if a statement of the particular time at which the acquittal took place was not necessary for that purpose, this objection will not be fatal to the plea. Now it is not an inflexible or invariable rule that the allegation *contra pacem* must be inserted in an indictment: *Regina v. Wyatt* (a), and an anonymous case in *Ventris* (b). Here the averment that the defendant was acquitted at a Quarter Session of the peace of the present king (reading the plea so) is sufficient, because it has reference to the then reigning monarch at the time when the plea was pleaded. This argument will be fully illustrated by recurring to the principle upon which this allegation has been held necessary at all, which was, to shew that the king was entitled to certain forfeitures consequent upon any act which constituted a breach of his peace; and this became necessary, because if the breach of the peace occurred within a manor or franchise, and this allegation were omitted in the indictment, the lord of the manor or franchise, and not the king, would be entitled to the forfeiture: 27 H. 8. c. 24. s. 4. But in the present case no forfeiture is attached to the offence charged by the indictment; therefore the object of the allegation is not involved, and the principle does not apply; the allegation, consequently, might have been omitted altogether, and, according to the case, already cited, of *Regina v. Wyatt*, "was surplusage, and could do neither good nor harm." [Bayley, J. "Because," it is added in the report, "it was a nonfeasance; this is an indictment for a misfeasance; therefore the argument does not apply."] The offence charged by this indictment cannot, perhaps, in the full sense of the word, be called a nonfeasance; for, generally speaking, a nuisance is a misfeasance. But there are

(a) 1 Salk. 580.

(b) 1 Ventr. 108, 111.

wide and important distinctions between nuisances of different kinds; and, according to the authorities upon that point, the nuisance charged in this indictment seems to be one that ranges under the class of nonfeasances, rather than of misfeasances: 2 Rol. Abr. tit. *Indictment, Chose de Form, G.* and *Holmes's case (a)*. In the first place, therefore, the allegation, "contra pacem," was not necessary at all in this plea; and in the second, even if it were necessary, still, as the allegation has reference plainly to the reign of the present king, and the plea was pleaded during his reign, there is no variance or uncertainty attached to it, because it must be construed according to the plain and ordinary meaning of the context, which shews the acquittal to have taken place during the present king's reign.

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ABBOTT, C. J.—I am of opinion that this plea is bad in form, and that judgment must be given for the crown on demurrer. A plea of *autrefois acquit* must set out the indictment upon which the acquittal took place, and must shew it to have been such an indictment in correctness, both of form and substance, as would have been sufficient to induce a punishment if the party had been convicted, and also that it was an indictment for the same offence as that charged by that indictment to which the acquittal is pleaded. If the offences charged by the two indictments are not the same, no averments in the plea can make them so. It is not necessary in this case to decide whether the omission of the conclusion, "contra pacem," would or would not have been fatal to the first indictment, though I have no hesitation in saying that the present strong inclination of my opinion is, that it would. Reading it as it is set out in this plea, it appears that

(a) Cro. Car. 377.

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it charges all that was done, to have been done against the peace of our said Lord the King, which it is equally plain, from the other parts of it, was *George the Third*. Now the present is an indictment for an offence charged against the peace of *George the Fourth*, and therefore an acquittal upon the former cannot be any answer to the latter, they being for different offences, committed in different reigns.

BAYLEY, J.—If it were necessary to decide whether it was essential that the first indictment should conclude against the peace, the present impression of my mind is, that it was, and some very strong reasons for that impression may be found in *Hawkins*, lib. 2. c. 25. s. 92. But we are not called upon to decide that question, because as the offences charged by the two indictments are evidently not the same, the defendant has never before been put in jeopardy for the offence now charged against him, and therefore cannot set up an acquittal for a former and distinct offence in bar of an indictment for a subsequent one.

HOLROYD, J.—I think that in an indictment like the present, the conclusion, *contra pacem*, is necessary; but it is quite clear, that on the trial of the first indictment the prosecutor's evidence must have been confined to offences committed in the reign of *George the Third*; therefore the two indictments charge two distinct offences, and an acquittal under one is no defence to the other(a).

Some doubt having subsequently been raised whether the Court should pronounce final judgment for the crown, or only judgment of *respondeas ouster*, the case was directed to be argued again upon that point: accordingly, on a former day in this term, the case again came on for argument.

(a) *Littledale*, J. was absent.

*Chitty*, for the crown. The Court must enter final judgment against the defendant. All the authorities concur in shewing that a plea of autrefois acquit is a plea in bar, and not a plea in abatement (a). Had this been a plea in abatement, the defendant might have been entitled to judgment of respondeas ouster, though it has been decided that in cases of misdemeanor, where issue is taken upon a plea in abatement, and is found against the defendant, the judgment is final: *Eichorn v. Le Maître* (b), and *Rex v. Gibson* (c). If judgment be given against a defendant on demurrer to a plea in abatement in cases of misdemeanor, the judgment is respondeas ouster, and not final; but the judgment on a demurrer to a plea in bar, is final; *Bowen v. Shapcott* (d). Had the plea been autrefois convict, or a pardon, it is quite clear that the defendant would not have been entitled to answer over; for though in cases of felony, if such pleas are found against him, a defendant may have judgment of respondeas ouster, in cases of misdemeanor the judgment is final, and the Court may proceed to pass sentence as upon a conviction (e). But that distinction is taken only in favorem vitæ (f), and does not apply to cases of misdemeanor; for there the rule is the same as it is in civil cases; *Regina v. Goddard* (g).

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*Brodrick*, for the defendant. This question is res integra, and as it is of vital importance to the public, demands the most careful consideration of the Court. No case has been cited, nor can any be found, which

(a) 2 Hale's P. C. 241; Hawk. P. C. b. 2. c. 35; Com. Dig. Indictment, L.; 4 Bl. Com. 335, 6; 2 Burn, Indictment, XI.; 4 Rep. 45.

(b) 2 Wils. 367. (c) 8 East, 107. (d) 1 East, 541.

(e) 2 Hale's P. C. 256. (f) 2 Hale's P. C. 239, 247.

(g) 2 Ld. Rd. 923. See 1 Chitty's C. L. 451, 463, 470, and the authorities there collected, on this subject.

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furnishes an authority for saying, that the present defendant must be concluded by the judgment given against him on the demurrer to his plea. The books certainly contain dicta bearing upon the subject, but there has never yet been an express decision on the point. In cases of felony it is admitted that the defendant may plead over after an issue on a plea in abatement has been found against him; and it has been repeatedly decided that he is entitled to the same privilege after judgment has been given against him on a plea of autrefois acquit. *Rex v. Vandercomb* and *Abbott* (a) and *Rex v. Coogan* (b). It is said, and truly, that this is done in favorem vitæ; but how are those words to be construed? Not as confining the rule to cases of actual life and death, because the privilege has always been extended to all felonies, clergyable as well as capital; but as applying it to all cases where the punishment consequent on conviction is heavy. Now there are many misdemeanors which are much more heavily punished than some clergyable felonies, and the present may fairly be considered as among the number; the sense and justice, therefore, is that the rule of practice in misdemeanors should follow that in felonies, instead of being assimilated to that in civil cases, where the defendant has originally the privilege of putting as many pleas on the record as he chuses. The cases already cited of *Eichorn v. Le Maitre* (c) and *Bowen v. Shapcott* (d) are authorities to shew that when the plaintiff has judgment on a demurrer to a plea in abatement, the defendant is at liberty to plead over, and for this conclusive reason, that "every man shall not be presumed to know the matter of law, which he leaves to the judgment of the Court." But that reasoning applies equally to pleas in bar, and applies also peculiarly to the present case.

(a) 2 Leach, 708. 2 East's P. C. 519.

(b) 1 Leach, 448.

(c) 2 Wils. 367.

(d) 1 East, 542.

So there are cases of pleas to the jurisdiction, which cannot strictly be called pleas in abatement, because they go in bar of the whole proceeding, when the judgment on demurrer is only judgment of respondeas ouster. In *Rex v. Johnson* (a) the defendant had judgment of respondeas ouster after a plea to the jurisdiction of all the Courts in *England* overruled on demurrer; and that was in substance and effect a plea in bar; and in *Rex v. The Earl of Devon* (b) the same rule seems to have been acted on. It is said that this plea resembles those of autrefois convict and pardon, and that as the judgment on demurrer to those pleas is final, it must be final here also. But there is a plain and important distinction; for by pleading a conviction or a pardon the party necessarily confesses his guilt, and therefore if he fails to establish a legal bar to the indictment, the judgment must of course be final, because there is then no issue of fact to try. A plea of acquittal, on the contrary, includes a denial of the party's guilt; and if by a technical error in pleading, which the defendant cannot be supposed to know of or to be able to prevent, he has lost his defence in law, it seems but just that he should resort to his defence in fact, and that he should at least have the chance of a trial, before he receives sentence and punishment. Lord *Holt*, it must be admitted, declared in *Regina v. Goddard* (c), "a man cannot plead over in any case but treason, or felony, and not in case of a misdemeanor;" that was, however, an extra-judicial dictum, for there was no question of pleading over then before the Court; and it was undoubtedly incorrect in some degree, because, even in cases of misdemeanor, it is quite plain that a man may plead over, after judgment on demurrer to a plea in

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(a) 6 East, 583.

(b) 11 St. Tr. 1354. Tremayne's P. C. 188. 8 East, 110. note, S. C.

(c) 2 Ld. Rd. 920.

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abatement. Unless, therefore, a man is to be presumed guilty, and punished as guilty, because his legal defence is destroyed by a technical error, although his plea, which the demurrer admits to be true in fact, contains no admission of his guilt, but unequivocally denies it; the judgment in this case cannot be final, and the defendant is now entitled to plead de novo.

The Court took time to consider of their judgment, which was this day delivered by

ABBOTT, C. J.—This case originally came before the Court on a demurrer to a plea of autrefois acquit, and after argument the Court held the plea to be bad. It has again come before the Court in the present term, in order to its being decided what judgment ought to be given, whether judgment that the defendant do answer over, or final judgment. The indictment is for a misdemeanor in keeping a common gaming house, and the demurrer concludes with a prayer that the defendant do answer over to the indictment. The Court, however, is not bound by the prayer with which any part of the pleadings in bar may conclude, but is to give such judgment on the plea in bar as by law ought to be given. This was settled after argument and deliberation in the case of *Le Bret v. Papillon* (a), and confirmed afterwards by the case of *Rex v. Shakespeare* (b). If the demurrer in the present case had concluded with a prayer of judgment that the defendant be convicted, still the Court would only have given a judgment to answer over, if that had been by law the proper judgment. We are, therefore, to consider the question as a matter of law, entirely independent of the particular prayer that has been put upon the record. The plea is a plea, not in abatement,

(a) 4 East, 502.

(b) 10 East, 83.

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but in bar. The distinction between those pleas in civil actions is well known. If a plea in abatement is held bad on demurrer, the judgment is that the defendant do answer over; but if a plea in bar is held bad on demurrer, the judgment is general against the defendant: for the general rule, in civil actions at least, is, that a defendant is not to plead a second plea in bar, after the first has been determined against him. If he might do this, he might also plead a third, a fourth, and so on, and there would never be an end to the proceedings. It is to be seen whether this rule applies also to an indictment for a misdemeanor. Another rule in civil actions is, that if issue is joined on a plea in abatement, and a verdict is found against the defendant, the jury who find the verdict assess the damages also, and the judgment recovered against the defendant is final, no further plea being allowed. The same rule applies to a plea in abatement to an indictment for a misdemeanor, if issue is joined thereon and found against the defendant. This was decided by the Court in the case of *Rex v. Gibson* (a). In this respect, therefore, the analogy between civil actions and indictments for misdemeanors is established by express decisions: but in felonies the rule is otherwise. "If a man plead any plea to an indictment or appeal of felony, that does not confess the felony, he shall yet plead over to the felony, *in favorem vitæ*; and that pleading over to the felony is neither a waiver of his special plea, nor makes his plea insufficient for doubleness. And, therefore, if he pleads any matter of fact to the writ or indictment, or pleads *autrefois* convict or *autrefois* acquit, he shall plead over to the felony; and although he doth it not upon his plea, but his plea be found or tried against him, yet he shall not be thereby convict without pleading

(a) 8 East, 107.



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to the felony, and trial thereupon." This is the first paragraph in the 33rd chapter of the second book of Lord *Hale's Pleas of the Crown*. The same learned author afterwards proceeds to speak of this subject in several passages, which I shall mention, as I think them material to our decision of this case. He says, that if he plead a plea that confesses the fact, as a release in an appeal, is *his opinion* he may, if he please, plead over to the felony, not guilty; and, accordingly, he says it was held by *Markham*, in 7 *Edward* 4. 15. a, though he refers to two later authorities to the contrary. He proceeds, if a man pleads the King's pardon, he shall not need to plead over to the felony, because it suits not with his plea; and yet, if the pardon upon a demurrer, or upon advisement of the Court, be adjudged insufficient, the party shall not thereupon be convict, but shall be put to plead to the felony, and be tried for it; the pleading of the pardon is a kind of confession of the fact; but yet, *in favorem vite*, the party shall be put to answer the felony. The reason of the rule in these cases is expressly mentioned by that learned author, and repeated by all other writers on the subject: it is in favour of life. And these passages also shew that there is not any distinction subsisting between pleas in cases of felony which contain an admission of guilt, and those which import a denial of it; but the rule is the same in both cases, because the reason extends to both alike. It is well known that there is no felony at common law, except petty larceny, upon which judgment of death may not be given; nor any misdemeanor upon which such judgment can be given: and, therefore, the reason of the rule will not apply to the case of a misdemeanor. If the reason does not apply, the rule ought not to be extended to misdemeanors. Accordingly, in the second volume of Lord *Raymond's Reports*, page

921, Lord Chief Justice *Holt* plainly declared his opinion to be, that a man could not plead over in any case except treason or felony, and not in case of a misdemeanor. It is true that this point was not then in judgment before the Court, but nevertheless the opinion of so great a judge is entitled to very great respect. The only case which is supposed to be a decision in favor of the present, is that of the Earl of *Devonshire*, which is to be found in the 11 *Howell's State Trials*, 1353. I should be sorry to be thought to consider that case as an authority for any thing; but upon examination it will not be found applicable to the present question. The plea of the earl was not properly a plea in bar, for he pleaded that no peer of Parliament could be called upon to answer before any Court inferior to the Court of Parliament, for any misdemeanor during the sitting of Parliament, or the usual time before or after a prorogation; that the information was filed during the time of privilege; and he concluded by praying judgment whether the Court would or ought to take cognizance of the plea aforesaid, that is of the information, during the usual time of privilege. Upon this very special plea, which was in the nature of a temporary plea to the jurisdiction, supposing the privilege to be disallowed, the proper, or at least the most lenient judgment would be, that the earl should answer to the information. That was the judgment in fact given. But that case cannot be considered as an authority upon the point now in question, and as the reason of the rule in cases of felony does not apply to cases of misdemeanor, and as it has been decided that the rule in civil actions does apply to cases of misdemeanor, where issue is joined on a plea in abatement; we are all of opinion that the rule in civil actions, and not the rule in cases of felony, applies to the present case, and, consequently, that the judgment against

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this defendant should be final, and not that he should answer over.

Judgment for the Crown.

The defendant was afterwards brought up for judgment, and received sentence.

Friday,  
November 12.

DYSON v. WOOD.

Trespass for breaking and entering plaintiff's dwelling-house, and seizing and carrying away his goods.

Plea, a justification under a judgment recovered in a court baron, and a precept issued thereon.

Replication, that there is not any memorandum of the proceedings, or of the said supposed judgment, remaining in the said court baron, in the said plea mentioned:—

Held, *Little-dale*, J. dubitante, that the replication tendered an immaterial issue, and was therefore bad on general error.

**DECLARATION** in trespass, for breaking and entering plaintiff's dwelling-house, and seizing and carrying away his goods. Plea, as to the breaking and entering the dwelling-house, that our lord the now king, before, &c. was, and still is, seised in right of his duchy of *Lancaster*, of the liberty and franchise of the honour of *Pontefract*, in the county of *York*, with the appurtenances; and that from time immemorial until the time of the passing of the 17 *Geo. 3. c. 15.*, a court baron had been used to be holden, in and for the said honour, for the suitors of the court, for the recovery of debts and damages not exceeding forty shillings, arising within the said honour, and after the passing of that act, for the recovery of debts and damages not exceeding five pounds, arising within the said honour; that defendant before, &c. recovered a judgment in the said court for 1*l.* 9*s.* 11*d.*, and prosecuted and sued out upon the said judgment, according to the custom of the said court, a precept directed to the chief bailiff and his deputies, commanding them to levy the said sum so awarded, &c.; concluding with a justification of the breaking and entering the dwelling-house for the purpose of levying the goods, under the precept. Replication, that there is not any memorandum of the proceedings, or of the said supposed judgment, remaining in the

said court baron, in the said plea mentioned. General demurrer, and joinder in demurrer.

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*Milner*, in support of the demurrer. The fact put in issue by this replication is immaterial, and therefore furnishes ground for a general demurrer. A court baron is not a court of record; therefore a judgment obtained there can be entitled to no greater weight than a foreign judgment, which it has been repeatedly decided is not a record: *Walker v. Witter* (a), *Galbraith v. Neville* (b). Suppose the defendant had taken issue upon the replication, and had brought into this Court the memorandum of the proceedings in the court baron, it could not have been read; such a document would not have been evidence, and the steward of the court baron must have been called as a witness to prove the proceedings. The only mode by which the proceedings in a court baron can be reviewed, and its judgment corrected, is a writ of false judgment; and when such a writ issues, the proceedings themselves are not removed into the court above, but the writ is directed to the steward, and he certifies the proceedings. The jury in a court baron have no power to act but by custom, nor can the court itself decide except by custom, for by common right all pleas in that court must be decided by wager of law, 2 *Inst.* 143.; and that must be inferred to have been the course here, for no custom to the contrary is alleged or found. The steward's memorandum is no evidence of itself; he may, for his own personal convenience, take a note of the proceedings, but that does not constitute the judgment of the court, nor operate as an authentic record of it. An issue, therefore, tendered upon the fact whether there is, or is not, remaining in the court baron any such memorandum or note, is a perfectly immaterial issue, and the replication

(a) 1 Doug. 1.

(b) Id. 5.

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tendering such issue must consequently be held bad on general demurrer.

*Blackburn*, contra. The fundamental question in this case is, whether a court baron ought, or ought not, to keep some memorandum, in the nature of a record, of their proceedings; because if it is their duty so to do, then this replication tenders a material issue, and cannot, at least, be questioned by a general demurrer. Now it does appear essential that such a memorandum should be kept, because a writ of false judgment, being in the nature of a writ of error from an inferior court, as was resolved in *Jentleman's* case (a), must be perfectly inoperative, unless some such memorandum could be produced; for, in the absence of such a document, the superior court would have nothing by which to guide their judgment, unless the judge and the suitors in the court below were to appear before them in person, which would be a most inconvenient and anomalous proceeding. [*Bayley*, J. Suppose the proceedings had been removed after the suing out of a fi. fa. upon the judgment, then the replication would have been true; but the replication does not state that there was no memorandum remaining in the court baron at the time when the fi. fa. issued, but only that there is none remaining now; that may be true, and yet the proceedings may have been removed.] The statute 17 Geo. 3. c. 15. s. 28., provides that the proceedings of this court shall not be removed at all; besides, if they had been removed before the fi. fa. issued, the defendant should have rejoined, and taken issue upon the replication. The objection here is that the traverse is immaterial, and there are authorities shewing that such an objection can only be raised by a special demurrer: *Hawe v. Planner* (b), and the cases there cited.

(a) 6 Rep. 11.

(b) 1 Saund. 14, note 2.

ABBOTT, C. J.—This replication is calculated to put in issue a fact so perfectly immaterial, that even if a verdict had been found for the plaintiff upon that issue, he could not have obtained judgment; and therefore I am of opinion that it is bad upon general demurrer. The plea states that there has existed, from time immemorial, within the honour of *Pontefract*, a court baron, the jurisdiction of which was at first limited by custom to sums not exceeding forty shillings, but was afterwards, by the 17 Geo. 3. c. 15. s. 27., extended to sums not exceeding five pounds. I cannot, however, find that any of the provisions of that statute at all affect or change the original nature or constitution of the court; it does not, at any rate, make it a court of record, and therefore we must treat it, as it is, as a court not of record. I do not think it necessary to the present question to inquire whether it is, or is not, the duty of the steward to make a memorandum of the proceedings of the court; but assuming that it is, and that he has neglected to perform that duty, still I cannot say that the judgment of the court has been rendered wholly unavailing. Construing the replication in the very largest sense that its words can bear, it asserts no more than this, that there is not now in existence, and never was made, any memorandum of the proceedings or judgment. Supposing that to be strictly true, the steward may be guilty of a misdemeanor in thus neglecting his duty, but his neglect of duty cannot operate to deprive an innocent party of the benefit of his judgment. The question whether judgment was given for that party, in such a court, is a matter of fact for the decision of a jury, and the production of the steward's memorandum would only increase the facility with which he could prove the affirmation of that question. But on a plea of judgment recovered in a court of record, the allegation is, that there is not remaining in the court below the record of

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any such judgment, importing therefore that no such judgment ever was given; and there the question, whether such a judgment has, or has not, been given, is to be decided by the court above, upon inspection of the record, and not by a jury. But the fact that a judgment has been given may be proved by evidence, and by other evidence than the steward's written memorandum; consequently, this replication does not go the length of denying that any judgment was given in the court baron, but merely asserts that the existence of such judgment cannot be proved by the memorandum of the proceedings. Upon these grounds I am of opinion that the replication in this case is insufficient, and that the defendant is entitled to judgment on demurrer.

BAYLEY, J.—I am also of opinion that this replication is bad. The plea states that the defendant obtained judgment in the court baron, and sued out execution thereon. The proper question arising upon that plea is, whether the defendant did obtain such a judgment; and the plaintiff might have denied that fact, and taken issue upon it; but instead of that he only says that there is no memorandum of the judgment remaining in the court: he does not even say that it was not remaining there at the time when execution was sued out. Perhaps that may have been properly ground of special demurrer, and of special demurrer only, because whether the memorandum was remaining at the time when the replication was pleaded, was a perfectly immaterial fact. But it seems to me that the replication is bad in substance, because, this not being a court of record, it does not appear that it was the duty of the steward to make, or keep, memoranda of the proceedings of the court; and even if that had appeared, the only result would be that the steward would be liable to punishment for neglecting his duty; not that the suitor

of the court should be prejudiced by his neglect. The argument that the memorandum would be necessary for the purpose of suing out a writ of false judgment at one time produced some impression on my mind; but, upon reference to the statute, that impression has been removed, because whatever obligation may have previously existed of making such memorandum, appears to be removed by the provisions of that statute.

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HOLROYD, J.—I think this replication is bad in law, and upon general demurrer. The allegation of the plea, that the defendant obtained a judgment in the court baron, puts in issue a fact which was triable by a jury; because the fact is alleged without a verification, and without a prout patet by the memorandum. The plaintiff, in his replication, does not deny that fact, either in express terms, or by necessary implication; he has therefore admitted it. The result then is, that the plaintiff admits that a judgment was obtained, but denies that there is any existing memorandum of it. That cannot go to invalidate the judgment itself, nor is it an answer to the plea, because it only denies the existence of one particular species of evidence of the judgment having been obtained.

LITTLEDALE, J.—I am inclined to think that the present objection could not properly be raised except on special demurrer. The plaintiff might have replied generally *de injuriâ suâ*, though he certainly was not bound to take that course; he was at liberty to put any particular fact in issue, but my doubt is whether he has put any fact properly in issue. It seems to me that the replication does in substance deny that any judgment was obtained. Undoubtedly the usual mode of proceeding in a court baron is by wager of law, but still I think it is the duty



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of the steward to make an entry of the fact that the defendant did come in and wage his law. If that was his duty, then we must intend that he did so, and then the allegation that no such entry is remaining, may fairly be construed as meaning that no judgment was obtained. On special demurrer, however, this replication would clearly be bad, and therefore I am not disposed to say that the defendant is not, upon the whole, entitled to judgment.

Judgment for the defendant.

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END OF MICHAELMAS TERM.

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**CASES**  
**IN THE**  
**COURT OF KING'S BENCH,**  
**FOR THE USE OF**  
**Justices of the Peace.**

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**HILARY TERM, 1825.**

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The KING *v.* The Mayor, Masters and Councillors  
of TOTNESS.

1825.

*Monday,*  
*January 24.*

**G. CROSS** moved for a rule calling on the Mayor, &c. of *Totness*, to shew cause why a mandamus should not issue to them, commanding them to assemble themselves together within the borough, and consider of the propriety of removing certain persons, by name, from the office of masters and councillors of the said borough, on the ground of non-residence. It was stated in the affidavits in support of the motion, that of fourteen masters and councillors chosen under the charter, but ten resided within the borough; that of these, four were unable to attend corporate meetings from age and infirmity; that by the charter the presence of eight masters and councillors was necessary to constitute a corporate meeting, and that the charter, in terms, required that the masters and councillors should be resident within the borough. Two instances were mentioned in which masters and councillors had been removed from their office, on the

Mandamus refused to compel a corporation to meet for the purpose of considering the propriety of removing non-resident members, where the charter in terms required residence.

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ground of non-residence. Great inconvenience was suggested as arising to the inhabitants from the infrequency of corporate meetings, by reason of the non-residence of members, and the illness of others, who were unable to attend; and it was alleged, that such meetings were only called when they suited the interests or convenience of the resident masters and councillors. This case, it was urged, was much stronger than *Rex v. the Mayor of Portsmouth* (a), because here the charter in terms required that the masters and councillors should be resident. [Abbott, C. J. But the difficulty is, that supposing a meeting of the corporation is called, and they do not chuse to remove the non-resident members, what benefit will be derived from this application? If they refuse to amove, a mandamus will afford no remedy whatever for the alleged evil.] If a legal meeting is called, and they do not think proper to amove, then they will subject themselves to a criminal information. [Abbott, C. J. I am not satisfied of that.] The charter requires that the masters and councillors shall reside. It is a duty imposed upon them, and if they neglect to perform it, they are liable to amotion; and if those whose duty it is to amove refuse so to do, a criminal information will lie. In granting the charter to this corporation, the crown must be supposed to have done so for a beneficial purpose, with a view to the interests of the inhabitants, but if the members of the corporation have disqualified themselves by non-residence, that purpose must fail. If the court refuses this application, the effect will be that this corporation will cease to be of any use for the purposes for which it was originally incorporated. This is the strongest case which has been presented to the court. The charter requires that the masters and councillors shall be inhabitants, and the

(a) Ante, 392.

public sustain a real inconvenience from the non-residence of some of the members. This is a very important question, and deserves at least more serious consideration than can be given it on motion. [Abbott, C. J. The Court has been of opinion, and is still of opinion, that if it were to assume to itself the power of granting applications of this kind it would exceed its jurisdiction. This court never thought of entertaining such an application until very lately indeed. In former times no instance of the kind is to be found. If we were now to accede to it, we should be opening a door to litigation which would be quite endless.] The absence of precedents may be accounted for, by observing that in former times corporators were more astute in upholding their corporate rights than in modern times. The only remedy for the grievance complained of is by mandamus. Until *Rex v. Heaven* (a), it was thought that a quo warranto information would lie for non-residence, but that case decides, that, until the corporate officer is removed, such an information will not lie. Unless, therefore, a mandamus issues, this corporation will become useless. There is no other method of compelling the corporators to do their duty. It is an unquestionable rule of law, that whenever a corporate body is guilty of a breach of duty, this court will set them in motion. Here there has been a breach of the charter, and this court has authority to compel the execution of its provisions.

ABBOTT, C. J.—The question is not properly, what the members of this corporation ought to do, but whether this court has power to do that which is now required of us. It is extremely difficult to define the precise limits of our authority; but it is our duty to take care not to exceed that which is a reasonable limit. In

(a) 2 T. R. 772.

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governing our discretion we must refer to that which has been the ancient practice of the court; and certainly the ancient practice has been not to grant applications of this kind. Under circumstances like the present, I think we ought not to take upon ourselves to establish a precedent, so likely to be attended with serious inconvenience. Speaking individually, I should be extremely unwilling to take upon myself the authority which the court is now called upon to exercise.

HOLROYD, J. and LITLEDALE, J. concurred (a) (b).

(a) *Bayley, J.* was gone to chambers.

(b) See *Rex v. the Mayor of West Looe*, post.

Monday  
January 24.

ROGERS v. JONES.

Mandamus granted to the steward of a manor to allow inspection of the court rolls to two tenants, litigating a right of common in the manor, although the cause was not at issue.

*R. v. RICHARDS* moved to discharge a rule obtained last term for a mandamus to the steward of the manor and lordship of *Writhin* in *Denbighshire*, commanding him to allow the plaintiff an inspection of the rolls of the manor as far as they related to the matters in issue in this cause. Both parties were freeholders and tenants of the manor of *Writhin*, doing suit and service to the lord. The plaintiff had declared in trespass, *quare clausum fregit*, to which the defendant pleaded a prescriptive right of common over the locus in quo. Issue had not been joined at the time the rule for a mandamus was obtained, and it was now contended, first, that in point of practice the mandamus could not issue in the present stage of the proceedings, and second, that as far as they had gone, no question appeared to be involved in the cause, which could justify an inspection of the court rolls.

**PER CURIAM.**—Whether the rule nisi for a mandamus was regularly obtained in the first instance, it is unnecessary to decide, but we are clearly of opinion that it is for the interest of all parties that it ought to issue.

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Rule refused.

The KING v. WARNFORD.

Tuesday,  
January 25.

**CHITTY**, in *Michaelmas* Term, obtained a rule calling upon a justice of the peace for the county of *Wilts*, to shew cause why a mandamus should not issue, directed to him, commanding him to amend the record of a conviction on the game laws, by setting out the evidence on which the conviction was founded, as nearly as possible in the words used by each of the witnesses examined before the justice, in pursuance of the 3 *Geo.* 4. c. 23., it being suggested that the record, as it stood at present, made the witnesses swear in the technical language of the statute, and not in the words alleged to have been used by themselves.

Mandamus lies to justices to amend the record of a game conviction, by setting out the evidence on which it is founded, as nearly as possible in the words used by the witnesses.

*Merewether* now shewed cause and contended, that the justice, having once drawn up the conviction, had no control over and could not alter it. He had always understood it to be an universal rule that a conviction once made matter of record could never be altered; and if erroneous, the relief could only be by appeal to the sessions. The question was whether the court had authority to grant a mandamus in such a case for such a purpose, and he submitted that it would be a dangerous practice to allow justices in any case to alter their

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conviction. In *Re Rix* (a) the court undoubtedly granted a mandamus for such a purpose, but the objection now taken was not suggested, it being agreed as matter of arrangement, that the evidence should be set out in order to raise a question of importance on the construction of the building act. Besides, in this case the justice would have difficulty in setting out the evidence, if the minutes taken at the hearing of the information were lost or mislaid. The statute on which this motion was founded had very recently come into operation, and that may be the reason why the justice had not set out the evidence in the words used by the witnesses. [*Bayley, J.* But before that statute the justices were bound to set out the evidence.] Not in the very words.

ABBOTT, C. J.—Nor are they now bound to set out every word. All that is required of them is, to set out the evidence as nearly as possible in the words used by the witnesses; that is, the substance and effect; but not every word. Here it is suggested that the witnesses are made to speak in the language of the act of parliament. No illiterate witness, nor indeed any witness, would say that the defendant “did use a certain engine called a gun, and a certain dog called a pointer, to kill and destroy the game.” The conviction must set out the language used by the witness, in order that it may be seen whether a right conclusion is drawn from it. The court will not assume that the justice has done his duty unless he tells us so by his own acts. This is an imperfect record, and ought to be amended.

*E. Alderson*, amicus curiæ, mentioned that this very

(a) Ante, 249. See *Rex v. Marsh*, ante, 182.

point had been decided in *Rex v. Allen (a)*, in the case of a game conviction drawn up by the magistrates at *Union Hall*, and the court ordered a mandamus to have the evidence set out.

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The COURT considered the objection not maintainable, and therefore made the

Rule absolute.

(a) Not reported.

The KING v. LYON and another.

Thursday,  
January 27.

**INDICTMENT** for not repairing a highway in the parish of *St. Pancras*, in the county of *Middlesex*. Plea, not guilty. At the trial before *Abbott, C. J.*, at the *Middlesex* adjourned Sittings after last term, it appeared in evidence that the place indicted formed a communication between *Sidmouth Street* and *James Street*, in the neighbourhood of *Gray's Inn Lane Road*, and was arched over, there being a dwelling-house over the arch. The archway was only nine feet in width and ten in height, through which it was proved that neither vans nor stage coaches could pass or repass. By an act of parliament passed in 1810, certain streets, lanes and squares built, or to be built, on land belonging to a *Mr. Harrison*, were directed to be paved by the commissioners for paving streets, &c. in the parish of *St. Pancras*. The way in question went over land belonging to *Mr. Harrison*, and before the passing of the act had existed as a way. It had, however, never been adopted or repaired by the parish, but had occasionally been mended with gravel by private individuals residing in the neighbourhood. On

A right of way for all the king's subjects to pass and repass with their carts and carriages, is not restrained because all carriages cannot pass and repass.

Where a way has been recognized as public in an act of parliament for making streets, squares, &c., it is not necessary that it should be adopted by the parish to make it a public way.



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the part of the defendants it was objected, first, that the evidence did not support the description given of the way in the indictment, inasmuch as all the King's subjects could not pass and repass with their carts and carriages as therein alleged; and second, that as there was no evidence of the parish having acquiesced in the dedication of the way to the public, it was not a public road which the defendants were bound to repair. The Lord Chief Justice overruled both objections, and the defendants were found guilty.

Abraham now moved for a new trial. The indictment alleges that the way in question was used for all the liege subjects of our lord the King and his predecessors, with their horses, carts and carriages, to go, return, pass, ride, and labour, at their free will and pleasure. The word "carriages" must mean, *ex vi termini*, *all* carriages. Now, it was proved that all carriages could not pass and repass, it being in evidence that neither vans nor stage coaches could pass and repass, and therefore there is a fatal variance, because the evidence only shews a limited right in the public; *Rex v. Marquis of Buckingham* (a). That was an indictment for not repairing a public bridge, over which it was alleged the King's subjects had a right to go "at their free will and pleasure," and it appearing in evidence that there was a bar across the bridge which was kept locked except in times of flood, it was held that the public had only a limited right to use the bridge at such times, and consequently the variance was adjudged fatal. [*Bayley, J.* That case does not bear on this. The same point was afterwards brought before this Court in another case. If you claim a right to go over a way at all times of the year, and it appears in evidence that you are not entitled at some period of the year, then the

(a) 4 Campb. 189.

indictment fails in proof. Here, all that is claimed is a right of way for all the King's subjects to pass and repass with their carriages; i. e. such carriages as the way will allow of passage.] Second, assuming that this is a way recognized by the act of 1810, and that it has been used by the public, still as there was no evidence that the parish had acquiesced in the dedication by repairing it or otherwise, it is not a public road which the parish are bound to repair. *Rex v. St. Benedict (a)*. [*Bayley, J.* In that case the road was originally set out under an inclosure act, and the right to use it was limited to certain persons only, and though the public had used it for many years, the Court held that the mere use of it was not a sufficient evidence of a dedication of it to the public.]

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ABBOTT, C. J.—The first point is clearly not tenable. The allegation that this is a way for all the King's subjects to pass and repass with their carriages, means only that all the king's subjects have a right to pass with *such* carriages as the way will admit of passage. There are many lanes in the country which are not wide enough for a waggon to pass, but that would not make it the less a public way for all the King's subjects to pass and repass with their carriages; i. e. such carriages as the way will allow of passage. Here there was abundant evidence that all the King's subjects had passed and repassed with such carriages as the archway would allow. Then, as to the second point, it appears that before the passing of the act in 1810 there had been a way. The act itself recites that Mr. *Harrison* had formed a plan, and had entered into an agreement with the commissioners, for building certain streets and squares upon his land, and that it would be desirable that such streets and squares,

(a) 4 B. & A. 447.

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when built, should be placed under the authority of the commissioners for paving *St. Pancras*; and then it points out the mode of setting out the footways and carriage-ways, and the manner in which they are to be paved. This, amongst other ways, is recognized by the act. If it is said that because this particular way has not been recognized by the commissioners, by repairing it, the defendants are to be exempt from the liability to repair, the same objection would apply to any of the principal streets marked out by the act.

BAYLEY, J.—The act of parliament makes this a public road, and therefore the adoption by the parish, to make it a public road, is not wanted.

HOLROYD, J. and LITLEDALE, J. concurred.

Rule refused.

Tuesday,
February 1.

If a continuance be entered from the last day of *Trinity* to the first day of *Michaelmas* term, facts occurring in the interim cannot be pleaded puis darrein continuance after the first day of *Michaelmas* term, without the leave of the

The KING v. JOSIAH TAYLOR (a).

INDICTMENT for a nuisance in keeping a common gaming-house. Plea, *autrefois acquit*. This plea was pleaded in *Trinity* term last, and at the *Westminster* sessions between *Trinity* and *Michaelmas* terms, the defendant was tried and acquitted on another indictment for the same offence. In *Michaelmas* term, before the prosecutor had replied to the former plea, the defendant pleaded his last acquittal puis darrein continuance. This plea was in fact put in on the 19th of *November*, but it was entitled of the term generally.

Chitty, in the course of the last term, having obtained

(a) S. C. ante, 487.

a rule nisi for taking this plea off the file, upon an affidavit suggesting that the last acquittal had been procured by bribery, fraud and collusion,

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Brodrick, on a former day in this term, shewed cause. This is an attempt to burthen the defendant with all the costs of the proceedings, but it cannot succeed; for the court have no such summary jurisdiction as this application attributes to them. The defendant is not an officer of the court, therefore there is no reason for their summary interposition; and there are cases shewing that the court have no discretion on this point, but are bound to receive pleas puis darrein continuance. *Paris v. Salkeld*, (a) and *Lovell v. Eastaff* (b). [*Bayley*, J. There was a special reason for the decision of the court in the latter case, namely, that a rule for a new trial was pending at the time the application was made. Besides, the title of this plea is irregular.] Undoubtedly the plea was pleaded on the 19th of *November*, and it is entitled of the term generally. Even if that be irregular, it is not such an irregularity as will warrant the summary interposition of the court. Suppose an untrue assertion had by accident found its way into the body of the plea, the court would not on that account take the plea off the file; they would leave the prosecutor to his common remedy, a replication, or a demurrer. It is not pretended that this plea is bad in substance, and it would be a new step to take it off the file for a mere informality in the title, which it is the constant practice of the court to allow the party to amend. But, under all the circumstances of the case, it seems that this plea is strictly regular and unobjectionable, for when issue has not been joined, facts puis darrein continuance may be pleaded of the term generally, and are not confined to the particular

(a) 2 Wills. 137

(b) 3 T. R. 554.

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day up to which the continuance is entered. Lord Chief Baron Comyns says, "If any thing happens pending the writ, and *before issue joined*, which goes in bar, or proves the writ abated, and not abateable only, it may be pleaded, without saying after the last continuance;" and he cites 2 *Lutw.* 1178. as an authority in point (a). Now the same rule would equally apply to the interval in the proceedings after plea and before replication, and the present case comes clearly within the principle laid down. [*Littledale, J.* In the same work, under the same head, you will find another case cited, from 2 *Jones*, 129, where the court received a plea puis darrein continuance at the end of a week after the commencement of the term.] If the court interfere at all, it can be only to order the defendant to amend his plea by entitling it on the same day on which it was filed; and even that they will not do upon the present motion; it must be the subject of a separate application.

Chitty, contra. The only question is, whether this plea is irregular, for if it is, the court may strike it off the file; and under the circumstances of this case, they will do so, if they can. The first plea put upon the record was a special plea, and the rules of practice do not allow a defendant to waive a special plea, and plead de novo, without the special leave of the court. *Tidd*, 901, 6 ed. and the cases there collected. The defendant has not even now ventured to swear that the last acquittal was obtained fairly and bonâ fide, therefore he certainly does not stand in a situation to ask for any indulgence from the court. The cases cited on the other side do not govern the present. Undoubtedly, where a plea puis darrein continuance is pleaded in proper time, the court have no discretionary power to receive or reject it; but

(a) Com. Dig. tit. *Abatement*. (l. 24.)

present is clearly pleaded out of time, and pleas of nature, if they are pleaded too late, may be set aside pleas in abatement, in respect of which the court frequently interfered in the manner now prayed for. *Houghby v. Wilkins* (a), and *Tidd*, 677. 6 ed.

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The Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J.—This case came before the court upon motion to set aside a plea *puis darrein continuance*. The indictment was for keeping a common gaming-house. The plea stated, that after the indictment was preferred in this court, another indictment had been preferred at the quarter sessions for the same offence, on which indictment being brought on for trial, the defendant was acquitted. This plea was pleaded generally if it referred to the first day of the term. It is clear, by the affidavit, that it was not put upon the file of the court until the 19th *November*. The prosecutor, his counsel, therefore moved to take that plea off the record, contending that a plea *puis darrein continuance* must be pleaded on that day to which the continuance was made; that is, that in this case it could be pleaded on the first day of *Michaelmas* term only. This is the case in a criminal proceeding. In civil actions, by the indulgence of the court, four days are allowed; but even if that indulgence was extended to cases of indictments, it would not extend to a case where the plea was not made until long after the first four days of the term. We consider how the record would have been drawn in ancient times, and how it should be drawn up in modern times, we shall find that it would state the continuance to be upon the appearance of the attornies for

(a) 2 Smith, 396.

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the prosecution and for the defendant, and that would be recorded on the first day of the term, an undertaking being given for the appearance either on the last day of the term, or some other day. Supposing this entry to have been made, it is quite clear that this plea, coming in after that day, and referring to a matter which took place in vacation, would, on the very face of it, appear to be a bad plea. Now it was said, inasmuch as there was no such entry on this record, this party might come in and put his plea on the file at a later time. It is obvious that he might have done so on the first day of the term; but why wait during almost the whole of that term, if he professed to enter the continuance from the very last day of the preceding term to the first day of the ensuing term? In the case cited by Lord Chief Baron *Comyns*, from *2 Jones*, the party was admitted to plead after the first day of the term, which certainly imports that it was not done without the permission of the court. No doubt for the furtherance of justice, more especially in a criminal case, if the party by any inadvertence has let slip his time and neglected to plead, the court would give him leave to do so. In the case of *Lovell v. Eastaff*, which was cited on the part of the defendant, we see that even though the defendant did not put in his plea until a later day, still, on a motion to take that plea off the file, the court thought it right to look to the circumstances of the case, in order to see whether justice required that it should be taken off. In that case the court refused to take the plea off the file; but what was the reason assigned? That on the first day of the term, and for several days afterwards, a motion was pending in this court for a new trial, and therefore, until that motion was disposed of, it would have been useless to put on the file that plea which was put on the file immediately after the motion for a new trial was

disposed of. The plea was a plea of bankruptcy, and would have been quite useless to put it on the file earlier. Upon the present occasion the plea was pleaded without any previous application to the court. The rule which was obtained to set aside the plea is founded upon an affidavit stating positively, that the acquittal which forms the subject of the plea had been obtained by fraud and collusion, and that is not denied by the defendant. He has been advised, and no doubt he has been well advised, not to pledge his conscience in contradiction to that which is here alleged. That fact remaining uncontradicted, the question is, if a plea irregularly pleaded should be suffered to remain on the file of the court, when its effect would be, according to an uncontradicted affidavit, to defeat the ends of justice, and to prevent the trial of the defendant, by means of an acquittal, obtained in all probability by his own money. For these reasons I do not think the rule ought to be discharged.

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Rule absolute.

The KING v. The JUSTICES of ST. ALBAN'S.

Thursday,
February 3.

ON shewing cause against a rule nisi, which had been obtained last term, for removing into this court by certiorari the appointment of surveyors of highways for the liberty of *St. Alban's*, for the purpose of having the same washed, the question was, whether, the certiorari was taken away by the general highway act, 13 *Geo.* 3. 78. s. 80.

Certiorari does not lie to remove the appointment of a surveyor, under the general highway act, 13 *Geo.* 3. c. 78. s. 80. The remedy to the party aggrieved by the appointment, is by appeal to the quarter sessions.

Brodrick and *Platt* shewed cause. It is clear that in this case the certiorari is taken away. By s. 80. of the

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general highway act, it is in express terms declared, that "no proceedings to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or removed by *certiorari* or any other writ or process whatsoever (except as hereinbefore mentioned) into any of his Majesty's courts of record at *Westminster*." The excepted cases referred to are contained in the 24th section, and relate solely to where roads are presented by justices on their own view as being out of repair. This case, therefore, not being expressly excepted, the general words of the 80th section come into operation, and the appointment of a surveyor cannot be removed into this Court. The rule is, that where there are express remedies given by a statute, and the *certiorari* is in terms taken away, the disability must operate as against all persons except the crown. In all other cases the Court is bound by the general words of the act. If that be so, then this, being an application at the instance of a private individual, to remove the appointment of surveyors, the result is, that the *certiorari* does not lie. If any individual is aggrieved by the appointment, the remedy is by appeal to the sessions, which remedy is given by the same section which takes away the *certiorari*.

Gurney and Brougham, contra. It is a settled rule in cases of this nature, that the *certiorari* always lies, unless it is expressly taken away, and an appeal never lies unless it is expressly given by the statute (a). Now here the *certiorari* is not expressly taken away, nor is an appeal given. The appointment of surveyors must, by s. 1. of the Highway Act, be made by the justices at special petty sessions. No appeal is given by s. 80. against any thing done by the special sessions, and therefore the appeal clause gives no relief; the remedy must

(a) See *Rex v. Cashiobury*, ante, vol. i. 485.

consequently be by certiorari. It has been decided that if an appeal be not given, the certiorari still lies; *Rex v. The Justices of the West Riding of Yorkshire* (a) and *Rex v. Mitchell* (b); which cases are also authorities to shew, that no appeal lies where the act complained of is done at the special petty sessions. There are instances to be found where appointments of surveyors have been quashed; *Rex v. Baldwin* (c) and *Rex v. The Justices of Denbighshire* (d); but it is true those have been where the appointments have been mere nullities, and the Court has accordingly directed a mandamus to make fresh appointments. According to what is said by Lord Kenyon in *Rex v. Baldwin*, if there is any objection to the appointment of surveyors, the party objecting should first remove it into this Court by certiorari, and then move to quash it. This therefore seems an express authority to shew that the certiorari is not taken away. Sect. 80. enacts, that if any person shall think himself aggrieved by any thing done in the execution of the act, for which no particular method of relief hath been already appointed, he may appeal to the quarter sessions, by whom the matter of *such* appeal shall be finally determined; and then it declares, that no proceedings had in pursuance of the act shall be quashed or vacated for want of form, or removed by certiorari. Now it is quite clear that this is not a case in which an appeal lies; and if so, then the certiorari is not taken away. Assuming that the proper remedy is by appeal, it can hardly be said that the act of appointing a surveyor is a thing done, in respect of which any individual can complain. On these grounds the rule for a certiorari must be made absolute.

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ABBOTT, C.J.—Supposing, upon the true construction

(a) 5 T. R. 629.

(b) 5 T. R. 701.

(c) 7 Id. 169.


(d) 4 East, 142.

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of the words of the 80th section, by which the writ of certiorari is taken away, they must be confined to the cases in which an appeal is given, then it becomes incumbent on the party applying for the writ, to shew that this is a case in which there could be no appeal. I am of opinion that this is a case in which there may be an appeal, and therefore it would be unnecessary to determine whether, upon the true construction of the words, the certiorari is taken away; for it would be sufficient to say, that the remedy must be by appeal in the first instance. The language of the clause giving the appeal is, "If any person shall think himself or herself aggrieved by any thing done by any justice or justices of the peace, or other person, in the execution of any of the powers given by this act, and for which no particular method of relief hath been already appointed, every such person may appeal to the justices of the peace at any general quarter sessions of the peace, to be held for the limit wherein the cause of such complaint shall arise." Now the act of appointing a surveyor of the highways is an act done by justices of the peace in pursuance of the powers given by the statute. That is a matter about which there can be no doubt. It is said, however, that the appointment of surveyor is by justices sitting in special petty sessions. I can find no distinction between an act done by justices assembled in what are called petty sessions, and the act of any other justices. The appeal is given generally to the justices at quarter sessions, to any person aggrieved by any thing done by *any* justice or justices of the peace or other person. I do not find any word which excludes the right of appealing against any thing done by the special petty sessions, and therefore there is no pretence for saying that this is a case in which the appeal is taken away. It is said that in this instance no person can be said to be aggrieved by the appointment of surveyor of

the highways. If that be so, it must be said that no person can have a right to complain or apply to have the appointment quashed. But I am of opinion that if there be an improper appointment of a surveyor, every inhabitant of the parish or liberty, if aggrieved, has a right to appeal. Independently, however, of this construction as to the right of appeal, I take it to be quite clear that the 80th section takes away the writ of certiorari. The words are general—"no proceedings to be had or taken in pursuance of this act shall be removed by certiorari into any of his Majesty's courts of record at *Westminster*." This is a proceeding had and taken in pursuance of the act, and therefore the certiorari does not lie.

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BAYLEY, J., HOLROYD, J. and LITLEDALE, J.
 concurred.

Rule discharged, but without costs.




The KING *v.* The INHABITANTS of EARL SHILTON.

TWO Justices by their order, dated 20th *October*, 1823, removed *John Bird*, *Mary* his wife, and their three children, from the parish of *Earl Shilton*, in the county of *Leicester*, to the parish of *Foleshill*, in the county of the city of *Coventry*. The Sessions on appeal quashed the order, subject to the opinion of this Court on the following case :

The pauper's birth settlement at *Foleshill* being admitted, the appellant proved a subsequent settlement at

Where a parish certificate, thirty-five years old, was granted by two persons who described themselves on the face of it to be "the major part of the churchwarden and overseer," and there was evidence on one side, that both before and ever since the certificate was granted, but ~~one~~ ^{two} overseers had acted in the parish, and on the other that in two instances, at least, ~~two~~ ^{one} overseers had been appointed, though only one had acted :—Held, that the Sessions might reasonably intend, as a question of fact, that there had never been more than one overseer appointed, and consequently that the certificate was valid.

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Earl Shilton, by apprenticeship to one *John Smith*, who resided there ; but who, the respondents contended, was a certificated person from the parish of *Croft*. The certificate was as follows :

“ The county of } To the Churchwarden and Overseer
Leicester, to wit. } of the Poor of the parish of *Earl Shilton*, in the county of *Leicester*,
 or to any of them.

“ We *John Brookes* and *William Frone*, being the major part of the Churchwarden and Overseer of the Poor of the parish of *Croft*, in the county of *Leicester* aforesaid, do hereby own and acknowledge that *John Smith* and *Sarah* his wife, and *Elizabeth* his daughter, and their future issue, to be our inhabitants legally settled in the parish of *Croft* aforesaid. In witness whereof we have hereunto set our hands and seals the first day of *June*, in the 29th year of the reign of our sovereign Lord *George*, by the grace of God, of *Great Britain, France*, and *Ireland*, King, Defender of the Faith, and so forth, and in the year of our Lord 1789.

“ *John Brookes*, Churchwarden. (L. S.)

“ *William Frone*, Overseer of the Poor. (L. S.)

“ Attested by *Henry Armston*.

Edward Stevens.

“ *Leicestershire*, to wit. We whose names are hereunto subscribed, two of his Majesty's Justices of the Peace for the county of *Leicester* aforesaid, do allow of the above written certificate ; and we do also certify that *Henry Armston*, one of the witnesses who attested the execution of the said certificate, hath made oath before us that he did see the churchwarden and overseer, whose names and seals are to the said certificate subscribed and set, severally sign and seal the said certificate, and that the names of the said *Henry Armston* and *Edward Ste-*

vens, whose names are above subscribed as witnesses of the said certificate, are of their own proper hand-writing. Dated the 8th day of *June*, 1789.

“ *Robert Abney.*

“ *T. Greaves.*”

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It was a printed form, with the blanks filled up, and the final “s” had been erased from the printed words “*churchwardens and overseers*” wherever they occurred, whether in reference to the certifying or certificated parish. The counsel for the appellants in answer to this, and in order to prove that there was but one overseer for the parish of *Croft*, at the time of the certificate being granted, proved that *J. Brookes* and *W. Frone*, named in the certificate, were dead; that the parish chest of *Croft* had been searched, and that the warrant of *W. Frone’s* appointment as overseer could not be found there; that *Joshua Clarke* and *Joshua Frone* acted as the executors of *W. Frone*, and that *Clarke* was the survivor, but did not produce the probate copy of *W. Frone’s* will, or offer any other proof of the appointment of the said *J. Clarke* and *J. Frone* as executors; that application had been made to the said *J. Clarke* as surviving executor, and to the solicitor whom the executors employed, and to the surviving children of *W. Frone* living in *Croft*, and to the existing parish officers, for the appointment of *W. Frone* as overseer. The appellants then called two witnesses; one who had lived in *Croft* thirty-six years, and had served the office of overseer six years before, jointly with another person, but could not say whether he had before that time heard of more than one overseer. He admitted however, that he only had acted when he was overseer. The other witness, who was parish clerk and had lived seventy years in *Croft*, said he never heard of more than one overseer for the parish in former times, but admitted that he had never attended the parish meetings, and knew

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nothing with regard to the appointment of the overseers. The appellants then put in the parish book of *Croft*, containing many entries prior and subsequent to, though not at the time of the certificate, respecting overseers, as follows: "*A. B.*, the late overseer, gave up his accounts as overseer to *C. D.*, the present overseer." Upon this the respondents called a witness, who was churchwarden of *Croft* and had served the office of overseer twenty-six years before, jointly with another person, but he only had acted, and for as long as he could remember one only had acted. They then proved the appointment of two overseers for the years 1813 and 1818, the memoranda of whose accounts being given up were in the said parish book as follows: "*A. B.* gave up his accounts as overseer of the poor." Upon this evidence the court of Quarter Sessions quashed the order, subject to the opinion of the court of King's Bench on the following questions: first, whether the appellants had shewn sufficient search to enable them to offer secondary evidence of the appointment of overseers; and second, whether the evidence which they gave, together with the objections on the face of the certificate, was sufficient to invalidate it.

The first point being now given up (*a*) by the respondents,

Copley, A. G. and *S. M. Phillips*, in support of the order of sessions, addressed themselves to the second. The question is, whether there was sufficient evidence to warrant the sessions in drawing the conclusion that there had been only one overseer appointed for the parish of *Croft*; for if there was, then the certificate acknowledging the pauper's master to belong to that parish is valid and binding. This was a question of fact for the sessions, and whether their decision was right or wrong, it

(*a*) See *Freeman v. Arkell*, 3 D. & R. 669.

is conclusive. All the evidence adduced on the part of the appellants tended to shew that there had never been more than one overseer appointed for this parish. This was rebutted by two instances only, in which there appeared to have been two appointed, but in those but one of the overseers had acted. The case of *Rex v. Morris (a)*, is an authority to shew that if it be not usual to appoint more than one overseer, the appointment of one will be valid. But after the lapse of 35 years, as in this case, the Court will intend that the certificate was valid. Every intendment is to be made in favour of a certificate which has been allowed by justices; and the doctrine laid down in *Rex v. Catesby (b)*, is expressly in point with the present case. Admitting that the sessions might reasonably have drawn a different conclusion from the evidence, still, as it was purely a question of fact, their decision is binding.

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G. Marriot, Humfrey, and Barnaby, contra. If the sessions have manifestly drawn a wrong conclusion from the evidence, the Court will send the case down to be reheard. Here it is obvious that a wrong conclusion has been drawn. The case of *Rex v. Catesby* has corrected a long prevailing impression which had existed with respect to the mode of establishing a settlement by certificate. That case, however, is distinguishable from this; for there the certificate upon the face of it shewed that it was granted by persons who described themselves as the *only* churchwarden and the *only* overseer of the poor of the parish. Here there is no such designation of the churchwarden and overseer, who signed this certificate; on the contrary, they are described as "the major part of

(a) 4 T. R. 550.

(b) Ante, 278. See 4 T. R. 797; 2 East, 175; 12 Id. 361; 8 Id. 334; 13 Id. 143; 1 B. and A. 275.

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the churchwarden and overseer." The evidence for the respondents proved that there had been, at least, in two instances, two overseers appointed, and if so, then this is not a valid certificate within the 8 and 9 *W. 3. c. 30.*, not having been executed by a majority of the parish officers. If the evidence had been silent as to the appointment of a second overseer, then the sessions might reasonably have intended that there had never been more than one appointed by custom, according to the cases; but this intendment could not be made in the face of the fact, that in two instances, at least, two had been appointed.

ABBOTT, C. J.—I agree with the law as laid down in *Rex v. Catesby*, that every intendment is to be reasonably made in favour of a certificate, allowed as this has been by two justices of the peace; and if the sessions had in this instance intended from the evidence before them, that there had been two overseers appointed for the parish of *Croft*, instead of one, I should have been perfectly satisfied with their decision. I should myself have drawn a different conclusion, but still it was a question for them upon the evidence, and as they were of opinion that there was only one, I cannot say (although I should have been better satisfied if they had come to a different conclusion) that they have done wrong. The order of sessions must therefore be confirmed.

BAYLEY, J.—I certainly should have drawn a different conclusion from the evidence in this particular case, than that which has been drawn by the sessions, but, unless a reasonable intendment is made in favour of the legality of the appointment of overseers, the effect would be, not only to make void the certificate, but the binding of the apprentice also. Undoubtedly I should have leaned in favour of the certificate; first, because it was 35 years

old; and second, because in the instances adduced of an actual appointment of two overseers, only one had ever acted. The fair inference was, that 35 years since there had been only one appointed, because from that time to the present there had been only one acting, and even in the years 1813 and 1818 when there appeared to have been two duly appointed, still, in those years, only one acted. Although I should have drawn a different conclusion from the evidence, still it was for the sessions to decide upon the case as a question of fact; and I cannot help expressing a hope, that the practice (which I call mischievous) which has obtained, at some sessions in this kingdom, of sending up to this Court questions of fact, in order that we may see whether the sessions have drawn the right conclusion, may be corrected. The sessions only are to determine questions of fact.

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HOLROYD, J. concurred (a).

ABBOTT, C. J.—I agree with my brother *Bayley* in the observation with which he has concluded. It certainly is to be wished that justices at sessions should have firmness enough to abide by their own decisions on matters of fact, instead of sending them to this Court for revision. If there should be occasionally an error in the conclusion which they draw from facts, it is a much less evil than the expense of litigation in which parishes are involved by the urgency of parties to have cases granted.

Order of sessions confirmed.

(a) *Littledale*, J. was absent.




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The EARL of FALMOUTH v. RICHARDSON
and another.

By the general inclosure act, 41 G. 3. c. 109. s. 10., commissioners are empowered to set out private roads, which, when set out, are to be *made* and kept afterwards in repair *at the expense of the owners and proprietors* of the lands inclosed:—Held, that commissioners who had *made* private roads under the authority of that and a private inclosure act, (which said nothing about *private* roads,) had no power to make a rate for reimbursing themselves the expense incurred.


THIS was an action of trespass against the defendants as commissioners under a private inclosure act, for seizing the plaintiff's goods, as a distress for a rate. The defendants justified the alleged trespass under a private inclosure act, 51 Geo. 3. c. 100., for inclosing lands lying in several parishes and townships, and also under the general inclosure act, 41 Geo. 3. c. 109., and pleaded, that, by sec. 54 of the private act, it was enacted "that as well the fees and payments to the commissioners, as also the charges and expenses incident to and attending the soliciting, obtaining and passing of the said act, and of the surveying, planning, dividing, allotting, and inclosing of the said open and common fields, lands, &c., and of preparing, making, and depositing the awards of the said commissioners, and of all other plans, maps, &c. directed by the commissioners to be prepared and made out, and all other costs, charges and expenses whatsoever, in anywise attending the execution of that and the general inclosure act, or any of the powers, authorities, provisoes or declarations therein contained, should be borne and defrayed at such times as the said commissioners should by any writing or writings under their hands, to be affixed, &c. (in certain places and at certain specified times,) order and direct, but subject to the regulations, proportions and restraints thereafter mentioned, that is to say, that so much of the said costs, charges and expenses as should be incurred previous to and up to the time of the passing of the act, and all other costs, charges and expenses as should thereafter be incurred, which should relate to or affect the said parishes and townships

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jointly, should be paid by the several proprietors of estates and other persons within the said several parishes and townships respectively, to whom allotments should be made by virtue of that act, in proportion to the value of the lands to be allotted to them respectively, to be ascertained by the said commissioners; and that from the time of the passing of that act, the commissioners should keep a general account of all costs, charges and expenses, jointly affecting the said parishes and townships; and also a separate account of all costs, charges and expenses as separately related to or affecting the said parishes and townships; which last mentioned costs, charges and expenses should be paid by the proprietors of estates and other persons in the said parishes and townships respectively, to whom allotments should be made by virtue of that act, in proportion to the value of the lands to be allotted to them respectively, to be ascertained by the said commissioners; and in case any person or persons should refuse or neglect to pay his, her or their share or proportion of such charges or expenses within the times, and to such person or persons as the said commssioners should appoint, then and in such case the said commissioners should cause the same to be levied and recovered in manner directed by the said recited act." Averment, that the commissioners had set out certain private roads pursuant to the general highway act, s. 10., and afterwards made their award, whereby they directed that certain persons should bear the expense of making and keeping those roads in repair; that the commissioners afterwards made a rate for that purpose, and because plaintiff refused to pay his share and proportion thereof, defendants, as such commissioners, issued their warrant and distrained his goods for the same. To this plea, plaintiff replied that the rate was made for the sole

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purpose of defraying the expenses of making the said private roads, so set out and appointed as aforesaid, in meadow *W.* (part of the lands directed by the act to be inclosed,) and that the rate was solely and exclusively made upon the owners of land in that meadow. Defendants rejoined, that making the private roads was part of the costs and charges attending the execution of the general inclosure act and the said private inclosure act. To this rejoinder there was a demurrer, and joinder in demurrer.

Campbell, in support of the demurrer. The question raised on these pleadings depends solely upon the construction to be given to section 10 of the general inclosure act, by which it is enacted “~~that~~ the commissioners shall set out and appoint private roads, and that the same shall be made, and at all times for ever thereafter be kept in repair by and at the expense of the owners and proprietors for the time being of the lands to be divided and inclosed, in such proportions as the commissioners shall by their award order and direct.” In the private inclosure act in question, there is nothing to be found which at all relates to the making of private roads, and consequently the commissioners have no authority to make a rate for defraying the expense of making such roads. It is true that, by the 54th section of the private inclosure act, power is given to them to raise money for the payment of their own expenses and of all costs, charges and expenses whatsoever attending the execution of that act, and of the general inclosure act; but if the making of private roads be not within the scope of their authority, they can have no power to make a rate for that purpose. Making private roads cannot be said to be any thing done in the execution of the private act, and

therefore the rate in respect of which this trespass was committed, is illegal, and the distress not justifiable. On this short ground the plaintiff is entitled to the judgment of the Court.

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W. E. Taunton, contra. The simple question is, whether the expense of making the private roads in this case, was incurred in execution of the private, or of the general inclosure act. If in execution of the latter statute, the plaintiff is entitled to judgment; if the former, the defendants. Now, by sec. 10 of the general inclosure act, the commissioners are to set out the private roads, and to direct by whom and in what manner they are to be made. Until the roads are actually made, it cannot be said that the power given to the commissioners is fully executed. The expense, therefore, of making the roads, is an expense incurred in the execution of the powers given by that section, and if so, then it follows that the defendants, as commissioners, had authority to make the rate in question. It has been held, that the commissioners have authority to levy a rate for defraying the expense of making roads under the powers given by the general inclosure act; *Haggerstone v. Dugmore* (a). In that case, it is true, that the expense was incurred in making public roads; but in principle there is no distinction, for the present purpose, between public and private roads. They stand on the same footing.

BAYLEY, J. (b).—Mr. *Taunton* has put this case upon the true ground. The question is, whether the expense of making the private roads in question was incurred in execution of the powers of the local act, 51 Geo. 3. c. 100. or of the general inclosure act, 41 Geo. 3. c. 109. It is clear that the former act makes no mention of private

(a) 1 B. & A. 82.

(b) *Abbott*, C. J. was absent.

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roads, and therefore we are to look to see whether the general inclosure act gives these commissioners power to make private roads. Whatever their authority is, it is given by the 10th section. By the 9th section the commissioners, before making any allotments, are to appoint public carriage roads, and prepare a map thereof, to be deposited with their clerk, and give notice thereof, and appoint a meeting; at which, if any person shall object, the commissioners, with a justice of the division, shall determine the matter. By the 9th section the commissioners are to appoint surveyors, and if with a salary, such salary and the expenses of making the roads, over and above the statute duty, shall be raised as other expenses, and paid on or before the execution of the award. Then follows the 10th section, which authorises the commissioners to appoint private roads, &c. It enacts that "such commissioner or commissioners shall set out and appoint such private roads, &c. as he or they shall think requisite, giving such notice and subject to such examination as to any private roads or paths, as are above required in the case of public roads; and the same shall be made and at all times for ever thereafter be kept in repair at the expense of the owners and proprietors, for the time being, of the lands and grounds directed to be divided and inclosed, in such shares and proportions as the commissioner or commissioners shall by his or their award direct." Here is no power given of appointing a surveyor as in the case of public roads, or of raising money to pay for the making of private roads. On the contrary, they are expressly directed to be made by the owners of the allotments, and at their own expense. It is quite obvious that no rate could be made by the commissioners for future repairs, for the words "making and repairing," are put conjunctively. It appears to me, therefore, that the defendants, as commissioners, were

not acting in pursuance of their authority when they made the rate in question, and therefore the plea is no answer to the action.

HOLROYD, J. concurred (*a*).

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Judgment for the plaintiff.

(*a*) *Littledale*, J. was absent.

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TRESPASS for an assault and false imprisonment. Plea, not guilty, and issue thereon. At the trial before *Park*, J. at the *Salop Summer Assizes*, 1824, the case was this:

The plaintiff, having withdrawn from her service with one *Hughes*, in *Denbigh*, before the expiration of the year for which she had agreed to serve, was convicted of that offence under the 4 G. 4. c. 34. s. 3. by the defendant, who acted as the deputy of one *John Copner Williams*, an alderman of the borough of *Denbigh*, and by him committed for one month to the house of correction at *Ruthin*, within the borough of *Denbigh*. The plaintiff having proved this case, it was objected on the part of the defendant that the plaintiff had not given the notice of action required by the 24 G. 2. c. 44. s. 1., and the question arose whether the defendant was a justice of the peace for the borough of *Denbigh*, and as such entitled to notice. The charter of the borough being produced, was found to contain a grant that the aldermen, bailiffs,

A charter provided, that there should be two aldermen in the borough of *D.* who should act for one year, by themselves, or their deputies; that on their death or removal, other aldermen should be elected, who should act for the rest of the year, by themselves, or their deputies; that in the absence of the aldermen, new aldermen might be elected in their room; and, that the aldermen for the time being should be jus-

tices of the peace for the borough:—Held, that the deputy of an alderman, was not a justice of the peace for the borough.

Semble, that since the 27 H. 8. c. 24. s. 2., the king cannot delegate the power of making a justice of the peace.

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and capital burgesses of the borough, for the time being, or the major part of them, of which one of the aldermen and one of the bailiffs should be two, being assembled from time to time, might and should have power and authority yearly, on &c. to elect two, out of the number of the burgesses of the borough, who should be aldermen of the said borough for one whole year, then next ensuing; that they, after they were so elected and nominated aldermen of the borough, should take the oaths before the steward or his deputy; or, if there were no steward at the time of such election and nomination, then before their immediate predecessors, and in the presence of ten capital burgesses of the said borough, for the time being, to execute their office well and faithfully; that they should have power and authority to execute by themselves, *or in their absence by their deputies*, the offices of aldermen of the said borough, for one whole year, then next ensuing, and until some other should in due form be elected and sworn into the offices of aldermen; that if it should happen that either of the aldermen of the borough for the time being should die, or be displaced from his office, that then and so often it should be lawful for the surviving aldermen, and the bailiffs and capital burgesses of the borough for the time being, or the major part of them, to elect or place in another of the number of the burgesses of the said borough, for alderman of the said borough; and that he, being so elected and placed in, might and should have and exercise the said office for the remainder of the said year, and until one or more were duly chosen and sworn to the said office, (the corporal oaths to be so first taken in form aforesaid,) by himself or themselves, or his or their deputies, in his or their absence.—Proviso, that the aldermen, bailiffs, and burgesses, of the said borough, or the major part of them, from time to time, and at all times thereafter, should and

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might have power and authority to elect and nominate, and that they should and might elect, the welfare of the said borough requiring it, and when it should be necessary and requisite, out of the number of the capital burghesses of the borough aforesaid, one or two other alderman or aldermen, in the absence of the other alderman or aldermen and bailiffs, or one or more of them, any thing to the contrary in any wise notwithstanding; and that he, or they, after they were so elected and nominated, as aforesaid, to be alderman or aldermen of the borough aforesaid, should take, as aforesaid, their corporal oaths, in due form, that they would execute their offices well and faithfully, so long as he or they should continue in the same. The charter then contained a clause constituting the aldermen of the borough, for the time being, while they remained in office, keepers and justices of the peace in the said borough, liberties and precincts of the same, &c.; and a non-intromittant clause: and it then concluded by naming the first aldermen, &c. In reply to this document, it was urged on the part of the plaintiff, first, that the crown could not delegate to a subject the power of creating a justice of the peace; and, second, that even if it could, still the words of this charter did not amount to any such delegation; the charter merely empowered the aldermen to execute by themselves, or their deputies, that particular office of alderman of the borough, and though it certainly did superadd the office of justice to that of alderman, still the former was and must remain a separate and distinct office, and the alderman could not appoint a deputy justice, although he might appoint a deputy alderman. The learned judge, however, thought that as one part of the charter empowered the aldermen to appoint deputies, and another part constituted the aldermen justices of the peace, both those parts must be read with reference to

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each other, and construed as giving to the aldermen power to appoint deputies to do all that they themselves had power to do under the charter; therefore that the defendant being a deputy alderman, was also a deputy justice, and as such entitled to notice of action. His lordship therefore directed a nonsuit.

Godson, in *Michaelmas* Term last, obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial had. He made two points; first, that the crown could not by charter, or otherwise, delegate to any subject the power of making a justice of the peace, or any judicial officer; and, consequently, that no justice of the peace, or other judicial officer, had power to appoint a deputy; and second, that even if the crown could delegate such a power, the words of this charter were insufficient to express such a purpose. First, such a delegation would be equally unconstitutional, whether as respects the rights of the subject, or the prerogative of the crown. The king is the fountain of justice, and in his hands the power of creating magistrates and other judicial officers is safely and becomingly placed; but it would be neither safe nor proper that justices themselves, who might be swayed by various improper motives, should have a similar power. On this point he cited *Com. Dig. Officer, D. 2.*, *Id. Justices, A. 1.*, *27 H. 8. c. 24. ss. 2. 6.*, and *Rex v. the Mayor of Gravesend*(a). Second, even if the king could empower a justice to appoint a deputy, he clearly could not do so, except by the most clear, express, and unequivocal words, and there are none such in this charter. Without express words to that effect, it by no means follows that an alderman is also necessarily a justice of the peace; *Rex v. Langley*; (b)

(a) 4 D. & R. 117.

(b) 2 Ld. Rd. 1029.

and in all such appointments it has always been held necessary that express words should be used, 4 *Inst.* 88. These deputy justices are quite superfluous in the borough, because the proviso in the charter authorises the election of new aldermen in the absence of those annually elected under the charter; the borough therefore would sustain no inconvenience, and the Court will, if possible, repress a practice so dangerous and unconstitutional.

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W. E. Taunton and *Campbell* now shewed cause. The alderman, under whom the defendant acted, had by the charter authority to appoint a deputy generally, which must mean a deputy to discharge all the functions which the principal himself had previously discharged. The charter constitutes two of the burgesses aldermen and justices of the peace for the borough, and no more; and it contains a non-intromittant clause. Then, if the argument on the other side is to prevail, whenever those two aldermen are absent from the borough, great inconvenience will arise from the utter defect of justice, for there will be no individual within the borough qualified to act as a justice of the peace. It must be admitted that without express authority for the purpose, no judicial officer can appoint a deputy; but here there is such express authority. The charter declares that the aldermen shall have power and authority to execute by themselves, or, in their absence by their deputies, the offices of aldermen of the borough. What are their deputies to do? They are to act *quà* aldermen, and to exercise in their persons all the duties and powers which would otherwise be exercised by the aldermen themselves. Had that clause of the charter which constitutes the aldermen justices of the peace for the borough preceded that which empowers the aldermen to appoint deputies, there would have been no room for argument on the point, for

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it would have been clear beyond a doubt that the deputies would have been good justices of the peace ; and if so, how can a directly contrary intention be fairly presumed from the mere transposition of these clauses ? The deputies are to act as aldermen, and the acting as a justice of the peace is, by the charter, part and parcel of the duty of an alderman. It is a general rule that every officer who may assign his office may also appoint a deputy ; and when an office is given to be held *per se vel deputatem*, the power to make a deputy is necessarily and impliedly given also. *Com. Dig. tit. Officer, D. 2.* and *Molins v. Worley (a)*. It is also a general rule that a deputy once appointed is invested with all the attributes which before belonged to his principal ; and it has been held that the principal cannot legally divide, or parcel out the duties of his office, but that if he delegates any part of his office, he must delegate the whole : and therefore that a covenant by a deputy not to perform that which his principal could perform was repugnant and void. *Com. Dig. tit. Officer, D. 3.* and *Parker v. Kett (b)*. That rule must decide the present case in favour of the defendant, for as by being appointed deputy to an alderman who was a justice of the peace, he became not only an alderman but a justice of the peace also ; he is within the statute and entitled to notice of action, which not having been given, the action cannot be maintained. The nonsuit consequently was strictly correct, and this rule must be discharged.

Godson, in support of the rule. The inconvenience and defect of justice pointed out on the other side are completely removed by the proviso in the charter, which enables the bailiffs and burgesses, in the absence of the aldermen for the time being, to elect others in their room.

(a) 1 Lev. 76.

(b) 1 Salk. 96.

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The aldermen thus elected are to be sworn before they are admitted to execute the office, a ceremony which is not required of the deputies ; so that if the argument for the defendant is correct, this monstrous absurdity follows, that the persons who are to fill the most important office of alderman and justice of the peace, jointly, need not be sworn to their good behaviour, while those who fill the less important office of alderman only must be. Lord Chief Baron *Comyns* is cited as an authority to shew that such officers as may assign their offices may also appoint deputies ; but the principle, however just, does not apply here, for a justice of the peace cannot assign his office. The relative position of the two clauses in the charter, as pointed out by the other side, is most important, and shews most clearly the intention of the crown to have been, that the deputies should represent and act for their principals so far as their character and office of alderman went, and no farther ; in a word, that they should be deputy aldermen, but not deputy justices of the peace. *Parker v. Kett*, therefore, does not govern this case, because that was an appointment of a deputy generally, and for all purposes, whereas here by the very frame of the charter the aldermen have only a qualified power of appointing a deputy, in a particular character and for a particular purpose. The main argument, however, is, that both by the law and constitution of the country, none but the king has, or can acquire the power of making a justice of the peace ; this was the argument relied on when this rule was moved for, and no substantial answer has been given to it. (Here the Court stopped him.)

BAYLEY, J.—The question in this case turns partly on the prerogative of the crown to delegate to a subject the power of making a man a justice of the peace, and

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partly on the construction of the charter. Assuming that the crown has such a prerogative, a charter professing to effect so serious an object ought at least to express its intention in clear and unambiguous terms. The present inclination of my opinion is, that since the statute, 27 H. 8. c. 24., the crown has ceased to enjoy this prerogative. That statute enacts in section 2, "that no person shall have any power or authority to make any justices of eyre, justices of assize, justices of peace, or justices of gaol delivery; but that all such officers and ministers shall be made by letters patent under the king's great seal, in the name and by the authority of the king's highness, and his heirs, kings of this realm, in all shires, counties, counties palatine, and other places of this realm, *Wales*, and marches of the same, or in any other his dominions, at their pleasure and wills, in such manner and form as justices of eyre, justices of assize, justices of peace, and justices of gaol delivery, be commonly made in every shire of this realm; any grants, usages, prescriptions, allowances, act or acts of parliament, or any other thing or things to the contrary thereof notwithstanding." Then in section 6 there is a proviso, "that all cities, boroughs and towns corporate, which have liberty, power and authority to have justices of peace, shall still have and enjoy their liberties and authorities in that behalf after such like manner as they have been accustomed, without any alteration by occasion of this act." There is no section in the act relating to corporations thereafter to be created, but the words are undoubtedly very general; and considering the power vested in justices of the peace, and the integrity as well as talent necessary to the due and beneficial discharge of their duties, it is plainly for the interests of society, not only that they should be carefully selected, but that the selection should be made by the highest and most

capable authority. Lord Chief Baron *Comyns* lays it down, that none but the king can make justices of the peace, and cites *Dalton*, s. 10, as his authority; and adds, that the king cannot grant to another the power of making them (*a*). The recorder of *London*, and the justices of great sessions in *Wales*, have no doubt the power of appointing deputies; but that is only for certain specific purposes, and is besides by virtue of an act of parliament: and the charter of *London*, which declares that the recorder shall execute his office by himself or his sufficient deputy, is confirmed by statute. By the 34 and 35 *H. 8* c. 26, the *Welch* judges were empowered to execute their offices by themselves, or their sufficient deputies; but by the 13 *G. 3* c. 51. s. 3, that privilege is now confined to certain specific purposes therein mentioned. But, admitting for the moment that the king can empower a subject to invest a fellow subject with the office of justice of the peace, still, considering the language of this charter, I cannot find that he has there expressed his intention so to do. The relative position of the clauses, as pointed out in argument, is very material to guide our judgment. The first enacts, that the aldermen, bailiffs and capital burgesses, for the time being, shall have power yearly to elect two of the burgesses who shall be aldermen of the borough for one year next ensuing, and who, after they are so elected aldermen, and before they are admitted to execute that office, shall take the oaths before the steward, or if there be no steward, before their predecessors and ten burgesses, to execute their offices faithfully; and that, when they have been so sworn, they shall have power to execute by themselves, or in their absence by their deputies, the office of alderman of the borough for one year next ensuing. Now by that clause the deputies are only em-

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(*a*) *Com. Dig.* tit. Justice of the Peace.

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powered to act as aldermen: but the duties and powers of aldermen differ materially in different boroughs, and it by no means follows that he who has the power of an alderman, has also for that reason the power of a justice of the peace. There is then a clause empowering the making of new aldermen in case of the death or removal of those elected for the year: and those new aldermen are to be sworn, and to execute the office by themselves or their deputies. Then comes the provision for the election of other aldermen to act in the absence of the former; but that does not give to such other aldermen the power of appointing deputies. So that there are two species of aldermen described, namely, those originally elected for a year and those afterwards elected upon their death or removal, all of whom have the power of appointing deputies; and those elected in the absence of those originally elected for a year, who have not the power of appointing deputies. The charter then declares that the aldermen for the time being, while they remain in office, shall be justices of the peace for the borough, but it no where says that their deputies shall be justices also. Indeed the charter in two other particulars takes an important distinction between the aldermen and their deputies, for the aldermen are required to be sworn, which their deputies are not; and the aldermen must be selected from among the burgesses, which their deputies need not. The inference arising in my mind upon this consideration of the charter is, that as the aldermen were clearly intended to act as justices, their deputies were as clearly intended to be excluded from so doing. And such a distinction is consistent with propriety and justice, for as the deputies need not be members of the corporation, an alderman might if mischievously, or even negligently disposed, appoint his own menial servant, or any other

equally unsuitable person; and the consequences to the public might be very injurious, for as the deputies are not required to be sworn, there would be no check upon their conduct: nor can any inconvenience arise, because as there is a power of electing new aldermen in case of the absence of the original aldermen, and as those new aldermen would be empowered to act as justices, no defect of justice can take place, and the language as well as the object of the charter will be fully satisfied. For these reasons I am of opinion that the nonsuit was wrong, and that the rule for a new trial ought to be made absolute.

HOLROYD, J.—I am of opinion that the defendant, as the deputy of an alderman, was not invested either with the office or the power of a justice of the peace. The charter appoints two particular persons justices for the borough, so to continue till others are appointed in their stead; and though it annexes thereby the office of justice to that of alderman, it does not follow that the former becomes part and parcel of the latter. An alderman has not, *virtute officii*, the power of appointing a deputy, as a sheriff, and some other public officers have; nor do I know that an alderman has, *virtute officii*, or *quâ alderman*, any known duties to perform; his duties and his powers are generally defined in the charter from whence his official existence springs. The powers of an alderman are corporate powers only, and can be exercised only on members of the corporation, but the powers of a justice are not bounded by the corporation, but are much more extensive both in their nature and operation. Then where an alderman has by his charter power to appoint a deputy, the latter will have all the powers of the former, that is, all his corporate powers, for those only can he transfer; but that is essentially different

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from the present case, because here the office of justice is annexed to that of alderman, and does not make part of it. I think, therefore, that the intention expressed by this charter is, that the deputies shall act as aldermen only; but at all events, considering that the general power of making justices is vested exclusively in the crown, it seems to me that there certainly are not words so clearly expressive of an intention to delegate that power, even if it can be delegated, which I doubt, as to justify us in holding that the defendant is in the eye of the law a justice of the peace. I agree therefore that the rule for a new trial must be made absolute.

LITLEDALE, J. concurred.

Rule absolute.

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The KING v. The MAYOR and BURGESSES of the  
 Borough of WEST LOOE.

Where the charter of a corporation declared that "it shall be lawful for the mayor and capital burgesses to remove any of their body for non-residence within the borough:"—  
 Held, that this gave them a discretionary, and not a compulsory power of amotion.

*WILDE*, Sergt. moved for a rule to shew cause why a writ of mandamus should not issue, directed to the Mayor and Burgesses of the Borough of *West Looe*, in the county of *Cornwall*, commanding them to assemble themselves together within the borough, and consider of the propriety of removing certain persons by name, from the office of a capital burgess, on the ground of non-residence within the said borough. The corporation of *West Looe* consists of a mayor and twelve capital burgesses, with power of making bye-laws, and of removing any of their body for any offence, or default, or reasonable cause, &c. The affidavits in support of the motion alleged, that for the last ten years, five only of the capital burgesses had been resident within the borough, and that the remainder resided wholly out of the borough, some at a

very considerable distance, and in one instance the party resided permanently in *India*. No inconvenience was stated to result to the inhabitants from the non-residence of the capital burgesses, but it was contended that, inasmuch as by the charter the mayor is to be selected annually out of the resident capital burgesses, and as that number consisted now but of five, it was impossible to exercise the fair right of selection. The learned Sergeant adverted to the late case of *Rex v. The Mayor of Portsmouth* (a), and submitted that the principle on which that case was decided ought not to govern the present case. The Court cannot speculate upon the question of convenience or inconvenience resulting to the inhabitants of a borough from the non-residence of its capital burgesses. If residence be the condition on which a capital burgess holds his office, and that condition be broken, it is a sufficient ground of amotion. Here the crown by its charter imposes residence as the condition of holding the office, and it has vested in the capital burgesses the power of removing its non-resident members. That power has not been exercised in the present instance, and the only mode of setting the mayor and capital burgesses in motion is by mandamus.


ABBOTT, C. J.—I am of opinion that we cannot grant a mandamus in the present case, and that opinion is grounded upon the terms of the charter which gives the power of amotion. The charter says “It shall be lawful for the mayor and the rest of the capital burgesses for the time being, to remove any capital burgess for any offence, or default, or reasonable cause, at the discretion of the mayor and the rest of the capital burgesses of the borough for the time being, or the greater part of them, &c.” It has never been thought, or even suggested,

(a) 4 D. & R. 767.

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that, under such words, this Court has authority to interfere, and order the removal of non-resident capital burgesses; for that is the effect of the present application. In the case of *Rex v. The Mayor of Portsmouth*, the effect of similar words in the *Portsmouth* charter was under our consideration, and we thought we could not exercise the authority which we were then called upon to exercise, namely, to command the removal of the non-resident aldermen. That was our opinion then, and we are of the same opinion still. If we were to interfere in the manner now desired, we should be usurping a power which does not belong to us. No injury is suggested as resulting to the inhabitants from the non-residence complained of. If there had been any mismanagement or misgovernment of the borough arising from this cause, that would be a different thing, but we have no authority to interfere on the ground now suggested.

BAYLEY, J.—I am of the same opinion. I took no part in the decision of *Rex v. The Mayor of Portsmouth*, but I concur entirely in the principle on which that case was decided. The impression on my mind is, that there may be many cases in which the non-residence of certain members of a corporation will work no mischief to the body of the corporation at large. If a capital burgess does not reside within the immediate limits of the borough, that will not render his holding the office incompatible, provided he resides within such a convenient distance as will enable him to discharge the duties of his office. Non-residence, in the strict sense of the word, would be a ground of disqualification in a great many boroughs, but though a party may be literally non-resident, that is, does not dwell within the borough, yet if he resides within such a distance as will allow him to discharge his corporation duties, a reasonable interpretation of the word must

be admitted. Where a charter says "it shall be lawful for the mayor and capital burgesses to remove for non-residence," I think that gives them a discretionary power to remove or not, as they shall think fit, and does not render it compulsory on them absolutely to remove for non-residence.

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BURGESSES of  
WEST LOOE.

HOLROYD, J.—The words "it shall be lawful for them, &c." certainly are very strong, but still it is for the consideration of the mayor and burgesses whether they will or will not take steps towards removing a non-resident.

LITTLEDALE, J. was absent.

Rule refused (a).

(a) *Vide* Cowp. 530; Carth. 227; 4 Mod. 33; Holt. 435; 2 T. R. 772; 2 Lord Raym. 1275; Ca. temp. Hard. 147; 4 Burr. 2087; 1 Ves. jun. 1; *Rex v. Hastings*, ante, vol. i. 148; *Rex v. Havering Atle Bower*, ante, vol. ii. 176; and *Rex v. Eye*, id. 172.

### SPENCELEY v. ROBINSON.

Tuesday,  
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**I**N debt on the statute 17 Geo. 2. c. 3.; the first count of the declaration stated that plaintiff was an inhabitant of the township of *Coxwold*, in the north riding of the County of *York*, and that defendant was one of the overseers of the poor of said township; that on 26th *March*, 1824, the churchwardens and overseers of the poor of the rate books, unless he shews that he has been *injured* by the refusal.

A rated inhabitant of a parish cannot sue an overseer for the penalty given by 17 G. 3. c. 3. s. 2., for refusing an inspection of

The demand of an inspection under this statute must be made at a reasonable time and place; therefore where the demand was made at a parishioner's own house at eight o'clock in the evening, and not at the house of the overseer:—Held, that the overseer incurred no penalty by refusing.


A parishioner is entitled by the same statute to have, on demand, a copy of the rate *forthwith* delivered to him, upon paying 6d. for every twenty-four names:—Held, that the overseer is entitled to a reasonable time to make the copy.

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said township made a rate for the relief of the poor, which was afterwards duly allowed by two Justices ; and that the churchwardens and overseers, after the allowance of the rate, gave public notice thereof in the church. Averment, that plaintiff requested defendant as such overseer to permit him, the plaintiff, to inspect the rate, and tendered to him one shilling for the same ; yet defendant neglected and refused to permit plaintiff to inspect the rate, contrary to the form of the statute in such case made and provided, whereby defendant forfeited 20*l*. Second count, that plaintiff, at a reasonable time, to wit, on &c. at &c. demanded of defendant, so being such overseer, a copy of the rate, and was ready and offered to pay defendant at and after the rate of sixpence for every twenty-four names thereof, yet defendant wholly neglected and refused to give him the copy, contrary to the form of the statute, &c. whereby, &c. Plea, the general issue, and issue thereon. At the trial before *Bayley, J.* at the last *Summer Assizes for Yorkshire*, the case was this : The plaintiff was a rated inhabitant of the township of *Carwold*, and the defendant was one of the overseers of the poor of that township. On the 26th *March* the rate in question was made, allowed on the 27th, and published on the next day. In the evening of the 19th *April*, about eight o'clock, the plaintiff sent his son to the defendant, desiring an interview at his, the plaintiff's, house. The defendant called on the plaintiff, and was introduced to his attorney. The plaintiff then demanded an inspection of the rate, and tendered one shilling to the defendant for his trouble in exhibiting it. To this the defendant replied, " I dare not do it ; I have been ordered not to allow an inspection." A copy of the rate was then demanded by the plaintiff's attorney, but refused for the same reason. The defendant afterwards consulted a neighbouring magistrate, whom he informed what had

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taken place, and told him he had not shewn the rate, because he was informed he was not obliged to do so. The magistrate however told him he was bound to shew the rate to every rated inhabitant, and pointed out to his attention the 2d section of the act of parliament; and by his advice the defendant, in about two hours after the inspection had been refused, returned to the plaintiff's house and offered to shew him the rate, and next morning at an early hour delivered a copy of it (which had been made in the course of the night) to the plaintiff's attorney. The attorney then said the copy came too late to enable him to give notice of appeal on behalf of the plaintiff at the next sessions. Upon which the defendant said there need be no difficulty on that head, for he would waive all objection to the notice being out of time. It appeared that on the 17th *April* the plaintiff's attorney had met the defendant at *Helmsey* market, about eight miles from *Corwoud*, and then asked him if he had a copy of the rate, telling him that he had been employed by the plaintiff, and was desirous of seeing it. The defendant immediately promised that he should have a copy if he was entitled to it. Upon which the attorney informed him that he should be at *Corwoud* on the 19th, when he should expect to have a copy delivered to him. Under these circumstances, the learned Judge having pointed out to the jury the provisions of the 2d section of the statute, which requires that the churchwardens and overseers shall permit every inhabitant to inspect the poor's rate at all seasonable times, paying one shilling for the same, and shall upon demand *forthwith* give a copy of the same, at the rate of sixpence for every twenty-four names, left it to them to say, whether there had been a substantial compliance on the part of the defendant with the requisites of the statute. The defendant was entitled to a reasonable space of time to enable him to comply



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with the obligations of the statute. It was true, that at one time the defendant had in a qualified manner denied an inspection of the rate, and also refused a copy of it, but the question was whether that denial and refusal had not been done away with by what occurred subsequently, for the defendant within two hours afterwards returned to the plaintiff and told him he might inspect the rate, and early next morning delivered a copy of it to his attorney. If the jury were of opinion that the defendant had complied with the demand within a reasonable space of time, his lordship thought the defendant entitled to a verdict. Verdict for the defendant.

*Brougham*, in *Michaelmas* Term, obtained a rule nisi, for a new trial, on two grounds; first, that the verdict was against the weight of evidence; and second, that the jury had been misdirected; for the defendant having once refused to allow the plaintiff to inspect the rate and give him a copy, a right of action had accrued, which could not be divested by a subsequent compliance.

*Scarlett* and *Alexander* now shewed cause. By the statute 17 Geo. 2. c. 3. s. 2., it is enacted, "That the churchwardens and overseers of the poor, or other persons authorised as aforesaid in every parish, township, or place, shall permit all and every the inhabitants of the said parish, township, or place, to inspect every such rate at all seasonable times, paying one shilling for the same; and shall upon demand forthwith give copies of the same or any part thereof, to any inhabitant of the said parish, township, or place, paying at the rate of sixpence for every twenty-four names." And by sec. 3 it is enacted, "That if any churchwarden or overseer of the poor, or other person authorised as aforesaid, shall not permit any inhabitant or parishioner to inspect the said rates, or shall

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refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer, or other person authorized as aforesaid, for every such offence shall forfeit and pay to the party aggrieved the sum of twenty pounds, to be sued for and recovered by action of debt, &c." Two offences are created by this statute; first, where the overseer shall not permit the inhabitant to inspect the rate at all seasonable times; and second, where he shall refuse or neglect to give copies of the rate forthwith, upon demand being made. The first question here is, whether there has been a demand made of an inspection, and of a copy of the rate, so as to found this action. Now the demand must be made at a reasonable time and place. At what time and place was the demand in this case made? According to the testimony of the plaintiff's son it was made at eight o'clock in the evening, at the plaintiff's own house. Eight o'clock in the evening is clearly not a seasonable time, still less is the plaintiff's own house the proper place to make such a demand. There is no obligation on the overseer to carry the rate books about with him in his pocket, nor is he under the necessity of shewing them at any hour at which an inhabitant may choose to demand an inspection. The proper depositary for the rate books is the overseer's own house, and the demand must be made at some hour suiting his reasonable convenience. Both the time and place therefore at which the demand in this instance was made, were improper, and would have justified the defendant's refusal. But assuming that the time and place were proper for making the demand, the second question is whether there has not been a substantial compliance with the requisites of the statute. The defendant at first refuses, upon a mistaken supposition that the plaintiff has no right to what he demands. He takes advice upon the subject, and within two hours afterwards he goes to the

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plaintiff's house and tells him he may inspect the rate; and the very next morning, at an early hour, a copy is delivered to the plaintiff's attorney. This, therefore, was a substantial compliance with the exigency of the statute. Some time must be allowed to make a copy of the rate, and the overseer may well take reasonable time to consider whether he will allow an inspection of it, if he doubts the authority of the party making the demand. At all events this was a question of fact for the jury. They were to determine whether the defendant had complied with the requisites of the law within a reasonable time, and they having found for the defendant, their verdict cannot be disturbed (a). But, in the third place, no cause of action arises to the plaintiff in this case. By the statute, s. 3., the penalty is to be given to the party *aggrieved* by the refusal. In what respect was this plaintiff aggrieved? The object of seeing the rate and having a copy was to appeal to the sessions. There was nothing, however, to have prevented his giving notice of appeal at all events to the next sessions. He might then have entered, and moved to respite the appeal until the following sessions, which the justices have a power of doing under 17 Geo. 2. c. 38. s. 4. But here the defendant offered to waive all objection to the notice of appeal; and supposing that would not have been sufficient, still the objection might have been waived in open Court by consent, under the 41 Geo. 3. c. 28. s. 5. (b). On these grounds there is no reason why the verdict should be disturbed.

*Brougham, contra.* The action in this case is not given as a remedy by way of damages for some injury suffered by the party, in consequence of the refusal or laches of the overseer to allow an inspection and deliver a copy of the rate. Whether the party be aggrieved or

(a) See 1 T. R. 168, and 6 East, 10 and 14.

(b) See *Rex v. Sheard*, ante, 261.

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not, whether he has suffered from the misconduct of the overseer, whether the plaintiff's notice of appeal would be bad or not, or whether a waiver could be given effectually of due notice, on the part of the lay-payers, are perfectly immaterial questions in this case, for the statute does not merely impose the penalty in the event of the party having sustained an injury, but says in express terms, that if the churchwarden shall not permit an inspection, or shall refuse or *neglect* to give a copy of the rate, he shall be subject to the penalty, without any regard to the loss or injury sustained by the party aggrieved. The overseers are public officers, and this is a duty imposed upon them imperatively, which if they neglect or refuse to perform, they are liable to the penalty, and therefore whether the plaintiff be aggrieved or not by reason of the refusal, his right of action to recover the penalty accrues the moment the overseer is guilty of a breach of his duty. It is quite beside the question whether the plaintiff could have given an effectual notice of appeal to the next sessions or not, because it does not lie in the mouth of the overseer to say in answer to this action, "though I had a certain defined duty cast upon me by the statute, yet you have no right to complain of my breach of that duty, unless you shew that you have sustained a consequential injury." The principal objection on which this motion was made has received no answer whatever on the other side. At the trial the question left to the jury was not whether the demand was made at a reasonable time and place, but first, whether the refusal was peremptory, and second, whether the demand had not been complied with within a reasonable time afterwards. It is to this mode of leaving the case to the jury that the objection arises. Now if the refusal in the first instance was peremptory, (of which there is no doubt, the evidence being all one way,) the reasonableness of the

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time within which the demand was afterwards complied with, is a question which cannot affect the plaintiff's right of action. Whether the demand was made at a reasonable time and place, was certainly a question for the jury; but the reasonableness of the time of complying with the demand was a question of law, but that could not arise after there had been once a positive refusal. There is no doubt upon the evidence, that on the evening of the 19th *April*, the defendant positively refused to allow an inspection and give a copy of the rate. Upon that refusal the plaintiff had a complete right of action, and that right could not be divested by a subsequent compliance. Undoubtedly it might have been left to the jury, as a question of fact, whether the whole conduct of the defendant amounted to a refusal, or to a determination not to accede to the plaintiff's request, but here there was no doubt that a positive refusal had taken place in the first instance, and that gives a right of action which could not afterwards be divested. In a late case of *Sheppard v. Matthewson*, before *Little Dale, J.* at *Hereford*, which was a similar action on the same statute, the churchwarden having taken an hour to consider whether he would comply with the request or not, the learned judge left it to the jury to say, as a question of fact, whether there had been a request and refusal within a reasonable time, but he laid it down broadly, that if there be once a refusal clearly proved, the subsequent compliance an hour afterwards would not divest the right of action. Here there was a positive refusal distinctly established, and therefore compliance two hours afterwards will not avail the defendant.

ABBOTT, C. J.—I think if we were to grant a new trial in this case we should convert this act of parliament into an instrument whereby a sharp and cunning attorney might be enabled to oppress an ignorant unlettered man,

called upon by law to exercise a troublesome and burthensome office. The only doubt that has occurred to my mind, after hearing the report of this case read, has been, not whether the case had been properly left to the jury, but whether the learned judge should not have taken upon himself to nonsuit the plaintiff. Not having been nonsuited, I think the plaintiff has no reason to complain of the manner in which the case has been left to the jury, for he had every chance of their finding in his favour. This action is brought on the statute 17 Geo. 2. c. 3. s. 2, by which it is enacted, "that the churchwardens and overseers shall permit all the inhabitants of the parish, township or place, to inspect every such rate at all seasonable times, paying one shilling for the same, and shall upon demand *forthwith* give copies of the same or any part thereof to any inhabitant of the said parish, township, or place, paying at the rate of sixpence for every twenty-four names." Upon this it is to be observed, that the person to whom the inspection is to be allowed, and the copy furnished, must be an inhabitant of the parish. If he sends his attorney, the overseer is not bound to attend to his request, unless the attorney comes with his client, and therefore the defendant in this case was not bound to take any notice of the request made by the plaintiff's attorney of the 17th *April*. The third section enacts, "that in case any overseer shall not permit any inhabitant or parishioner to inspect the said rates, or shall refuse or neglect to give copies thereof, such churchwarden or overseer, for every such offence, shall forfeit and pay to the party *aggrieved* the sum of twenty pounds." The words of the statute giving the penalty appear to me to import, that there must be some person who has sustained an injury by the act of the overseer, before any penalty is incurred. Unless there be some party *aggrieved*, I do not see how it is competent for him to sue. Now was this plaintiff

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aggrieved by any thing done by the defendant? If he meant to appeal (and probably he did) he might have entered his appeal at the next sessions, and then have given a notice in order that it might be heard at the following sessions, the justices having power to direct an adjournment. I see no objection to that mode of proceeding. Did the defendant, or did he not, comply with that which the act of parliament requires? Before an overseer can be sued for not allowing an inhabitant to inspect the rates, the demand must appear to have been made at a convenient time and place. First, as to the time, it must be at such an hour as may be reasonably supposed convenient to the overseer, and not at any hour that the party may think proper to make his demand. Here, according to the evidence, the demand is made at some hour in the evening, (the precise hour is left in some degree of doubt,) when perhaps it might be very inconvenient to the defendant, who probably had his own affairs to mind, to attend to the message sent him. Second, as to the place, it must be at the residence of the overseer, where the rate may probably be supposed to be, unless some other place of deposit is directed. But instead of going to the house of the defendant, the plaintiff sends a message desiring him to attend him at his, the plaintiff's own house. The defendant was not bound to go, still less was he obliged to carry the rate book with him. It was the business of the plaintiff to call upon him at his house, at a convenient and proper time. But when he goes, does the defendant positively refuse to allow an inspection and copy of the rate? No, he merely says, "I dare not do it; I am ordered not to do it. I shall not shew it unless I am bound so to do; unless the law compels me." This is at some hour of the evening which is not well ascertained. But doubting whether he was justified in shewing the rate, he immediately takes the advice of a magis-

trate, as to the course he should pursue, and the very same evening he goes to the plaintiff's house and tenders the book for inspection. The very same night also he makes a copy of the rate, and next morning delivers it to the plaintiff or his attorney. Upon this state of facts it is clear that the demand was not made either at a reasonable time or place. But assuming the demand of a copy of the rate to have been properly made, still the defendant was entitled to a reasonable time to comply with the demand. Here it is complied with in as short a time as could reasonably be expected. A copy is made in the course of the night, and the next morning it is delivered. It is said that my learned brother did wrong in leaving it to the jury merely to say whether the defendant had complied with the provisions of the statute within a reasonable time; and it is objected that the reasonableness of the place was not put to them. No point of that kind was raised at the trial; but in leaving it to the jury in the way my learned brother did, that necessarily involved the question whether there had been a legal demand, namely, a demand at a reasonable time and place. Complying within a reasonable time involves both time and place. The jury were to decide whether the demand was made at a reasonable time and place, and they have determined the question against the plaintiff. For these reasons it appears to me, that the case was properly submitted to the jury, and that they have given the right verdict; and I am strongly inclined to think that the demand not having been made at the defendant's house, the learned judge ought to have directed a nonsuit the moment that fact was ascertained.

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HOLROYD. J.—It appears to me that the plaintiff is not entitled to recover. I was struck in the early part of the argument in this case with the question, whether there was a legal demand or not, it not having been made at a reasonable time or place, which last, it ap-



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pears to me, ought to be at the overseer's own house, and not at the house of the party making the demand. I think therefore the demand was not sufficient. But upon the other point, I am also of opinion that the plaintiff was not a party aggrieved. He could not be said to be aggrieved unless he was placed in a worse situation with respect to his rights. There is no proof that he was in any respect aggrieved, because he might still have entered an appeal at the sessions, supposing the refusal to have taken place. Upon the statutes relating to bankrupts, it has been held that unless a party be a creditor, he cannot be considered as a party aggrieved within the intent and meaning of the bankrupt law.

BAYLEY, J.—In this case I was of opinion that the plaintiff alone was entitled to inspect the rate books, but I had great doubt whether he had a right to insist that his attorney should be present at the time. I thought at the trial, and do now think, that the request made by the attorney in the presence of the plaintiff, at his the plaintiff's own house, was not a sufficient demand to bring the defendant within the penalties of the act; but I was desirous that the whole case should go to the jury. On the other point, it struck me, that the defendant, not being a lawyer, and ignorant of the express provisions of the statute, might very reasonably refuse to comply with the demand made, until he had inquired of those who knew better, and was entitled to a reasonable time to make that inquiry. The question then was, whether, though there was something which at first looked like a refusal, the defendant did not afterwards comply with the request within a reasonable time. This was the way I left the case to the jury. (a)

Rule discharged.

(a) *Littledale*, J. was absent.

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## BASTEN v. CAREW and another.

**THIS** was an action of trespass for breaking and entering the plaintiff's house and closes, and evicting him therefrom. Plea, not guilty, and issue thereon. At the trial before *Abbott*, C. J. at the last *Devonshire Assizes*, the case was this:—

The plaintiff was lessee of a farm and premises at the rent of 280*l.* and was under covenant with his landlord to repair, &c. The defendants were justices of the peace for the county of *Devon*; and the alleged trespass was in delivering possession of the farm and premises to the plaintiff's landlord, for a supposed vacant possession, under the statute 11 *Geo. 2. c. 19.* After the trespass had been proved, the defendants gave in evidence the record of their proceedings under the statute, which was to the effect following:—" *Devonshire.* Be it remembered, that on &c., at &c., *C. D. H.* Esq. of &c., in the said county of &c., complained unto us, *J. W. Carew* and *C. O. Osmond*, Esquires, two of the justices of our said lord the king, assigned to keep the peace within the said county, &c., that he, the said *C. D. H.*, did demise at rack rent, unto *J. Basten*, of &c., husbandman, a messuage and tenement, called &c., consisting of &c., situate, lying, and being at &c., aforesaid, in the county aforesaid, and that on &c., there was in arrear and due unto the said *C. D. H.*, from him the said *J. Basten*, the tenant of the said demised premises, half a year's rent thereof, and that he, the said *J. Basten*, hath deserted the said demised premises, and left the same uncultivated and unoccupied, so as no sufficient distress could be had to countervail the said arrears of rent; whereupon the said *C. D. H.* then and there, to wit, on &c., at &c., requested of us, the

The stat. 11 *G. 2. c. 19. s. 16.*, which gives a summary remedy to landlords whose tenants have deserted their premises with rent in arrear, and no sufficient distress, by requesting two justices, on their own view, to deliver possession, does not require the request or complaint to be made upon oath. Therefore, where in trespass against two magistrates for turning a tenant out of possession under this act, a record of the proceedings drawn up conformably to the statute, was given in evidence: Held that it was a complete defence to the action, though they did not appear to have acted on the oath of the landlord.

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said justices, that a due remedy should be provided, according to the form of the statute in that case made and provided; which complaint and request by us, the aforesaid justices, being heard, we (having no interest, nor either of us having any interest in the said demised premises,) on &c., at &c., did personally go upon and view the said demised premises, and then and there upon our own proper view, did find the said complaint to be true, and did then and there fix at the most notorious part of the said premises, to wit, upon the outer door of the mansion house, a notice in writing, under our hands and seals, that we, the said justices, on &c., would return to take a second view thereof; upon which said &c. we did return to take a second view of the said premises, and there upon our own proper view did find that he, the said *J. Basten*, did not appear, nor any person on his behalf, to pay the said rent in arrear, and that there was no sufficient distress upon the said premises, nor upon any part thereof, to countervail the said arrear of rent; therefore we, the said justices, at &c., on &c., did put the said *C. D. H.* into possession of the said demised premises, according to the statute aforesaid. In witness &c." This record, it was contended, must, on the authority of *Brittain v. Kinnaird* (a), be taken as conclusive evidence of the truth of the facts stated therein, and afford a full defence to the action. As to the formality of the record, (which was copied from a precedent in *Burn's Justice* (b), the case *Ex parte Pilton* (c) was cited as giving the sanction of this court to that form. For the plaintiff it was contended, that as the complaint set out on the record did not appear to have been made *on oath*, the adjudication of the justices thereon was of no force or validity, and therefore afforded no defence to the action. The Lord

(a) 4 J. B. Moore, 50. S. C. 1 B. & B. 432.

(b) 1 Burn, 916. Ed. 24.

(c) 1 B. & A. 369.

Chief Justice thought there was much weight in this objection, but doubted whether it could be taken advantage of any where but at the assizes, upon appeal pursuant to s. 17 of the act. To this it was answered, that supposing the objection had succeeded at the assizes, still the plaintiff would have his remedy by action for damages at law. The learned judge then allowed the case to proceed, reserving to the defendants liberty to move to enter a nonsuit upon two questions, first, whether the instrument in question was a proper record of the proceedings, the complaint not appearing to have been made on oath; and second, whether the objection could be agitated in this court. The case went to the jury upon the merits, and under the learned judge's directions, a verdict was found for the defendants.

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*Wilde*, Sergt. in *Michaelmas* Term obtained a rule nisi for a new trial, on two grounds, first, that the verdict was against the weight of evidence, and second, that the jury had been misdirected in point of law. On shewing cause now however, the argument turned solely upon the question as to the formality of the record upon which the defence was founded, and therefore it is unnecessary to notice the other points.

*Pell*, Sergt. *Tancred*, and *Chitty*, shewed cause. It is no objection to the validity of the record, that it does not appear that the complaint made by the plaintiff's landlord was taken upon oath. The record in this case stands upon the same footing as a conviction on a penal statute, and must be taken as conclusive evidence of the facts which it purports to recite, and is a full defence to the action; *Brittain v. Kinnaird* (a). Now it is a

(a) 4 J. B. Moore, 50. S. C. 1 B. & B. 432.

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general rule with respect to convictions, that it is not requisite that the information should be upon oath, if it be not enjoined by the letter of the statute (*a*). There the statute does not require the complaint to be made, or the evidence taken on oath. By sect. 16. of 11 G. 2. c. 19. it is merely enacted, that two justices may, at the *request* of the landlord, go upon and view the premises, and affix on the most notorious part thereof, notice in writing, what day they will return to take a second view, and if on such second view the tenant shall not appear and pay the rent, or there shall not be sufficient distress on the premises, then the justices may put the landlord in possession. The record in this case was drawn from a precedent in *Burn's Justice* (*b*), which was approved of in *Ex parte Pilton* (*c*). In commenting upon this very statute *Dr. Burn* (*d*) makes these observations: "And the justices in this and all other the like cases, ought to make a record of the whole proceedings, to be produced afterwards in case of an action brought against the landlord by such tenant. For the justices are not to carry witnesses with them about the country, to testify what they shall act as judges of record; nor does it seem requisite they should go and testify in a Court upon their oaths what they should have acted in such cases; but to make a record in writing under their hands and seals, of all that hath been done; which record, being produced in court, seemeth to be the proper evidence in all such cases, for that the law reposeth an entire confidence therein, and it shall not be gainsaid; otherwise there would be no end of things." Here the justices have drawn up a record of their proceedings, strictly pursuing the requisites of the

(*a*) *Rex v. Willis*, Bosc. 16. Payley on Convictions, 2d Ed. by Dowling, 20. Id. 70.

(*b*) 2 Burn, tit. "Distress," 916. Ed. 24. (c) 1 B. & A. 369.

(*d*) 2 Burn, 893. Ed. 24.

statute; and as there is no obligation on their part to take the *request* (for it is no more) of the landlord upon oath, it would have been unnecessary for them to have done so. Had the legislature intended that the request or complaint should be made on oath, doubtless the act would have been so expressed, as is the case in sect. 4. by which, in the case of fraudulent removal or concealment of goods, not exceeding the value of 50*l.*, two justices, on complaint exhibited in writing, may summon the parties concerned, examine the fact and all proper witnesses upon *oath*, &c. But there is an obvious reason why in this particular case the complaint should not be taken on oath, for here the justices are to proceed on their *own* view, and satisfy themselves by ocular inspection, whether in point of fact there is a vacant possession, before they interpose on behalf of the landlord. If they are satisfied of that fact, then they have jurisdiction to determine accordingly, without the evidence of other witnesses upon the subject. There are other cases in which the magistrates are not required to have the oath of the party in order to give them jurisdiction. For instance, in the case of forcible entry and detainer, the magistrates act upon their own view, without oath, and even though the consequences are much more serious to the party than here; yet the record of the proceedings only shews a complaint, and not the evidence, upon which the justice proceeds (*a*). On these grounds the instrument produced at the trial was a perfect record, and affords a complete answer to this action.

Wilde, Sergt. in support of the rule. The document given in evidence in this case and called a record, is not entitled to that character, and therefore is not con-

(*a*) See the precedents, 2 Burn, 470. et seq. 24th Ed.

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clusive for the defendants. The statute, on which this question arises, arms the justices with extraordinary powers, which, being liable to abuse, ought to be construed with the utmost strictness. In the first place, the act authorises an ex parte proceeding against the tenant. There is no provision made for giving him notice of the justice's intention to visit the premises, or that the landlord has made any complaint. He has no right to be heard in answer to the application. Though he may not have actually quitted his farm, yet any individual may go and tell the magistrates that there is rent in arrear, and that the premises are deserted. Upon this hearsay information, without any notice to, or inquiry of, the tenant, although he may be within a few hundred yards of the spot, the magistrates may go to the place, and if he happens not to be at home, they are bound to conclude, perhaps against the truth of the case. [*Bayley, J.* The determination of the magistrates is not conclusive. An appeal is given to the assizes.] It is no answer to the present action, that the party has another remedy elsewhere. The question is whether this is such a record as can upon any principle of law be thought conclusive in this action. [*Abbott, C. J.* When the magistrates go first, and find the premises vacant, they are bound to affix a notice on the premises of their intention of coming again. If, upon their coming a second time, they find the premises are not deserted, or there is a sufficient distress on the premises, their jurisdiction is gone.] But the only circumstance which is material to the tenant, takes place without any notice to him. The statute provides, that in case a certain amount of rent shall be due, and the premises shall be deserted, the magistrates may without any previous communication with the tenant, or giving him an opportunity of traversing the assertion of his landlord, go and view the premises, and come to the

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conclusion upon the fact, without oath, that there is rent in arrear, or that the premises have been really deserted, or only left for a temporary occasion. Before the justices come to this conclusion, the tenant is precluded from going into the question, and satisfying them that the representation of the landlord is untrue, and that the premises have not in fact been deserted. He is therefore concluded, *ex parte*, by the first visit, upon those points which give the justices jurisdiction, and if at the end of 14 days he does not pay his rent, or if there be no sufficient distress on the premises, the justices may put the landlord into possession. It is clear upon the face of this supposed record, that the justices have not acted upon the information of the landlord given on oath. This is supposed to be a judicial, and not a ministerial act. Now it is an universal principle of law, as well as of natural justice, that no man should be concluded by the judgment of any tribunal until he has been heard in his defence, except where there is default on his part, after due notice and warning. Here the magistrates act judicially; and the party is to be bound by their judgment. Upon what then is their decision founded? Why merely upon the hearsay evidence of another, upon a statement not made under the sanction of an oath. What security then has the subject for the due administration of this important jurisdiction? Suppose false information is given to the magistrates, under such circumstances, the information not being given under the obligation of an oath, no proceeding by indictment for perjury will lie, nor does it appear that the party would have any remedy by action against his landlord, for maliciously causing the magistrates to act. In the case of the magistrates, no action would lie against them, unless there was conclusive evidence that they acted from corrupt motives. It seems to have been settled by the case



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referred to on the other side, that the record of a conviction shall be taken as conclusive evidence of the facts therein stated, and operate as a complete defence to the magistrates, but this must be understood to mean, where the magistrate proceeds upon the oath of the party who causes him to interpose his jurisdiction. If in the present case this supposed record is to operate as a defence to the magistrates, the plaintiff has no remedy whatever. They stand upon this record after notice of the error which appears upon the face of it. Magistrates, by a strange anomaly in the law, have power, even after action brought for an unlawful act done by them, of drawing up their conviction afresh, and correcting any error which may appear upon the face of their proceedings. This opportunity was not taken in the present instance. The defendants have omitted to amend a defect which might easily have been supplied, and therefore they cannot now avail themselves of that rule of law by which the record of their proceedings is to be a defence. Will this Court hold that this record is to be conclusive of the truth of the facts which it professes to set out, when those facts have been stated behind the back of the party who is to be affected by them, and when they are not even stated upon oath? Does it need the express direction of an act of parliament to require, that in proceedings so serious in their result, the same solemnity, the same regard to the first principles of justice, should be observed, by which the proceedings of all magistrates sitting judicially are conducted? Will it be intended from the silence of this act of parliament, that the legislature, in giving so summary a jurisdiction, meant that the magistrates should adopt a different mode of proceeding from that which takes place in every jurisdiction, high or low, in the country? If the magistrates are empowered to proceed *ex parte*, *à fortiori*, they ought not to act unless upon the

oath of the party who sets them in motion. The acknowledged rule of law, governing every tribunal acting judicially, and the principles of common justice require that the magistrates shall act upon the oath of the party, and upon his oath only. Unless there is something in this act which compels the Court judicially to say, that a subject of the realm may be ousted of his house and land, without notice, upon the ex parte hearsay statement of his landlord, then the Court, proceeding according to the genius and principles of the law of *England*, will hold that this is not a record, in point of law, which will afford any defence to these magistrates.

ABBOTT, C. J.—At the trial of this cause, the record of the proceedings in question was given in evidence as a decisive answer to this action, and on the authority of the case of *Brittain v. Kinnaird*, I was pressed to nonsuit the plaintiff. The objection now urged by my brother *Wilde*, to the validity of the instrument as a record, was then taken. I entertained some doubt upon the point, and I did that which I am in the habit of doing on all occasions where I entertain doubt, I forbore to nonsuit, and suffered the cause to proceed, in order that if hereafter it should turn out that I was mistaken in my opinion, the parties might not be put to the expense of a second trial. But in the shape in which the case now comes before the Court, this rule must be discharged, if I ought then to have nonsuited; and upon consideration, and paying due attention to all the arguments now used, I am of opinion that I ought to have nonsuited the plaintiff. I take it to be a general rule and principle of law, that where justices of the peace have an authority given to them by an act of parliament, and they appear to have acted within their jurisdiction, and to have done all that the particular statute requires them to do in order to origi-

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nate their jurisdiction, their conviction drawn up in due form, and remaining in force, is conclusive evidence for them in any action which may be brought against them for the act so done. In this particular case it is said that there would be great hardship if we were to hold that the record in question were to have that effect. That topic has, however, been pressed to an extent which the circumstances of the case, and the law, will not warrant. In the first place, there is, by the 17th section of the statute, a summary remedy given in the nature of an appeal to the assizes, whereby, if any wrong has been done to the tenant, he may have redress, and have the matter examined into by a second tribunal, and this at no great risk; for if it is decided against him, the costs to be awarded against the appellant cannot exceed the sum of 5*l*. In the second place, he has another remedy; for although the record of the proceedings below may be conclusive in favour of the justices, yet it will not be so with respect to the landlord, who, if the rent be not actually due, may be liable to an action on the case for having maliciously and improperly caused the magistrates to proceed under the statute, if there be any wrong done. There are many cases in which, though no action will lie against a magistrate who is acting *bonâ fide* and according to law, upon the information laid before him, yet an action lies against the party for giving the information, if it be false and malicious, and with a view of working an injury. The act of parliament upon which this proceeding arises does not direct the magistrates to make any inquiry upon oath. Are we then to impose upon them the necessity of doing so? Are we to say that by forbearing to make the inquiry upon oath, and forbearing to state upon the record that they made the inquiry upon oath, they have done wrong? Are we to say under these circumstances that they have not done all that the

legislature requires them to do? It would be extremely hard upon justices of the peace, and those also who are to act in such situations, if, having an act of parliament presented to them, applying their attention to it, and doing all that upon reading it they can find the legislature requires of them, they shall be subject to an action of trespass, because they have not done something, which the act does not require them to do. The act nowhere says that the complaint or information shall be made upon oath, or that the rent shall be proved to be due in that mode. All that it says is, that "if any tenant holding lands, tenements, or hereditaments, at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, shall desert the demised premises and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for two or more justices of the peace of the county, riding, &c. (having no interest in the demised premises) at the request of the lessor or landlord, or his or her bailiff or receiver, to go upon and view the same, and to affix on the most notorious part of the premises notice in writing what day (at the distance of fourteen days at least) they will return to take a second view thereof, &c." That is all that the act requires. The justices are, on *their own* view, to determine whether or not the premises are deserted. Suppose they should refuse, upon request, to do that which the landlord requires them to do; or suppose all the magistrates of the neighbourhood choose to refuse, this act of parliament, which was intended by the legislature to give a beneficial remedy to landlords, could not be executed without the interposition of this Court. The case last put is certainly an extreme one, and not very likely to occur; but supposing such a case to exist, and

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an application were made to this Court for a mandamus, it is exceedingly difficult to say that we should not be bound to direct a mandamus to compel them to go and view the premises. But, however, the material and the important ground of my judgment is, that inasmuch as the legislature does not require the justices to receive the complaint or make the inquiry on oath, the record of these proceedings under this act need not shew that the complaint or inquiry was so made. These defendants have done every thing which the legislature has required of them, and that being the case, we think the record reciting the facts therein stated, is conclusive on their behalf, leaving to the party such other remedy as he may have against his landlord, if the latter has improperly set the justices in motion.

BAYLEY, J.—I am of the same opinion. This is an action, not against the landlord, who sets the justices in motion, and who, if he improperly and without just grounds sets them in motion will be answerable for any injury which the tenant sustains, but an action against the magistrates for what they have done, on the ground that they were not warranted in the act they did. The only question then is, whether upon the face of their proceedings they appear to have acted within the scope of their authority. Now the 11 Geo. 2. c. 19. s. 16. does not require that there shall be a complaint made to the justices on oath, but simply that the magistrates shall upon the *request* of the landlord go and view the farm, and if upon seeing it they find it in the state described, a notice is to be affixed on the most notorious part of the premises, stating that on a certain day the justices will return; and then if the rent remains in arrear, and there is no sufficient distress, they are to put the landlord into possession. All, therefore, that the justices are required

to do, is to act upon their own view when the complaint is made. It is said that this is a harsh mode of proceeding, and leaves the justices to act in a way that may be most oppressive to a tenant. That assumes that the justices will act corruptly. If they do so, then they certainly are not exempt from punishment for such corrupt misconduct. Then it is assumed that the party is without remedy. That is clearly not so, because he has a perfect remedy against his landlord if he improperly requires the magistrates to act; but when the legislature has required the magistrates to act upon their own view, and has not imposed upon them the necessity of receiving the complaint on oath, it would, in my opinion, be a most mischievous course of proceeding if they were afterwards, at their own peril, to be subject to the expense of an action, and to be saddled with all the costs which such an action must produce. The party has also another remedy by appeal to the justices of assize, which is given by the seventeenth section, if brought within the time there stipulated. In this case, as the justices have done every thing which the act requires them to do, and as the record of their proceedings is drawn up conformably to the directions there given, that record is conclusive evidence in their favour, and is an answer to this action.

HOLROYD, J.—I also agree with the judgment given by my Lord Chief Justice and my brother *Bayley*. This is an action of trespass against magistrates who have acted in discharge of a duty committed to them by an act of parliament, and the question is, whether the record of their proceedings is conclusive in their favour. It is objected to the record that it should appear that the complaint had been made on oath. I think there is no weight in that objection, because the complaint is not directed by the act of parliament to be taken on oath,

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and need not be in any case unless it is otherwise directed by the particular statute. Informations are not generally laid on oath, but if they are afterwards to be established by evidence, then the oath is to be administered to the witnesses. Here the magistrates appear to have acted in pursuance of the directions of the statute, and therefore the objection has no foundation. That being so, I apprehend it to be an established rule, that the record of the justices, acting in pursuance of their authority, is conclusive in their favour, if an action be brought against them. If, indeed, they have corruptly made a record different from the facts of the case, in order to make it appear to be within their jurisdiction when it is not so, they will be liable to criminal prosecution. The statute in question gives the magistrates jurisdiction to act at the request of the landlord, and whether his statement be true or false they have power to view the premises and investigate the complaint. So far the justices clearly have jurisdiction. If they are induced to act upon a request which is supported by a false representation respecting the rent supposed to be in arrear, then the party aggrieved has his remedy by action on the case against the landlord for maliciously causing the justices to act. But the justices having jurisdiction to ascertain whether or not the tenant has deserted the premises, they are for this purpose judges of record. It has been holden on the statutes of forcible entry that they are judges of record. In *Floyd v. Barker's* case it is said, (a) "if a justice of peace record that upon his view as a force, which is no force, he cannot be drawn in question either by action or indictment." In 1 *Salk.* 397, quoting 27 *Ass.* 19, there is this passage; "a judge of oyer and terminer, where the jury found and presented a fact to be a trespass, caused their finding to be entered as a felony,

(a) 12 Rep. 25.

and yet could not be punished by indictment or otherwise, because he was a judge of record, and the indictment against him was to defeat his record by averring against what he did as a judge of record." Again, in *Strickland v. Ward*, (a) which was an action of trespass for false imprisonment against a magistrate, a conviction of the plaintiff for unlawfully returning to a parish after having been legally removed from thence without bringing a certificate, and also a warrant reciting the conviction, were given in evidence as a defence to this action; and Mr. Justice Yates held, that the conviction could not be controverted in evidence; adding, that the justice having competent jurisdiction of the matter, his judgment was conclusive till reversed or quashed; and that it could not be set aside at nisi prius, and consequently the plaintiff was nonsuited. If indeed the justices have no jurisdiction in the matter in which they act, they are liable to an action of trespass, as was held in *Morgan v. Hughes* (b), where a magistrate maliciously granted a warrant against the plaintiff without any depositions before him, upon a supposed charge of felony. In *Miller v. Scrace* (c), which, however, has been since overruled in *Doswell v. Impey* (d), it was held that an action would lie against commissioners for committing a bankrupt who did not answer to their satisfaction, and this was on the ground that commissioners are not judges, but De Grey, C. J. admitted, that they would have been protected had they been acting as judges; but the important part of his judgment for this purpose, is where he says, "so justices of the peace may be justices of record, when made so by act of parliament, as in case of riots, force, going armed, &c. in which case their records are not traversable." Here, then, these defendants having

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(a) 7 T. R. 634.

(b) 2 T. R. 225.

(c) 2 Sir W. Bl. 1145.

(d) 2 D. and R. 350.



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recorded proceedings respecting a matter which is clearly within their jurisdiction, the parties are concluded by the record, which not being traversable, it is a good defence to the action. Undoubtedly the jurisdiction of justices may be abused, but if there is any corrupt abuse of their powers, the law provides a remedy against them. Where, however, they confine themselves within their jurisdiction, but are improperly set in motion by the landlord, the tenant may have redress by action against the latter. On these grounds I think this rule must be discharged(a).

Rule discharged.

(a) *Littledale*, J. was absent.

Wednesday,  
 9th February.

The KING v. The MAYOR, &c. of WEST LOOE.

An inhabitant of a borough is not, by force of his inhabitancy, entitled to be a corporator; therefore, where the inhabitant of a borough applied for a mandamus to be enrolled and sworn a corporator, but did not shew an inchoate right in the inhabitants to be corporators, the Court refused the writ.

THIS was a rule calling on the mayor and steward of the borough of *West Looe* to shew cause why a writ of mandamus should not issue, directed to them, or other proper officer in that behalf, commanding them, at the next court-leet to be holden for the said borough, to enrol and swear *Robert Reath* as a resiant and burgess of the said borough. The affidavits upon which the rule was obtained set forth the following facts. *Robert Reath* is an inhabitant householder in the borough, and has applied at the court-leet to be enrolled and sworn as a resiant and burgess, but has been refused. In the reign of *Edward 2.* a charter was granted to the borough, which recited and confirmed a former charter, by which *Richard Earl of Poictou and Cornwall* granted to *Odo de Freverbyn* that his borough of *Portbyan*, otherwise *West Looe*, should be a free borough, and that the burgesses of the same borough should be free and quit of all customs.

Also, if any one should reside for a year and a day in the same borough without just claim, he should, according to the law of other free burgesses, be quit of all neifty and servitude. In the 16th year of the reign of *Elizabeth*, another charter was granted to the borough, which recited that *Portbyan*, otherwise *West Looe*, was an ancient town, and that the burgesses and inhabitants had immemorially enjoyed several franchises, as well by prescription as by charters theretofore granted to the tenants and inhabitants of the town, and that the town was brought to great decay by reason of the poverty of the inhabitants, and that divers of the inhabitants had petitioned her majesty to make the same inhabitants a body corporate; and granted, that the said borough should thenceforth be a free borough corporate of one mayor and burgesses, being inhabitants of the town aforesaid. It then provided that there should be twelve capital burgesses, who were to be the common council, and to make bye-laws, &c.; and that in case of the death of any capital burgess, a new one should be elected within eight days by the mayor and capital burgesses: and it then gave them a court-leet to be holden twice in every year, at *Easter* and *Michaelmas*. There are no books of record of the borough extant of an earlier date than 1607, but there are books in regular succession from that year to the present, excepting one interval from 1623 to 1641, and those books contain entries of the proceedings of all the borough and leet courts held from time to time, of the elections and swearings of the mayors, and of the elections, swearings, and removals of the capital burgesses, &c.: and of the swearings of the freemen upon their being entered on the resiant roll, of the lists of the jurors, of some few bye-laws, and of all the other corporate transactions. In these books there are lists, most of them annual, of the persons from time to time forming the corporation, which

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lists form part of the proceedings of the leet or law courts, and are thus placed in the books :

From 1607 to 1624. Free tenants, residents, capital burgesses.

1641. Free tenants, capital burgesses, residents.

1645. Free tenants, capital burgesses, sensores.

1649. Capital burgesses, free tenants, residents.

1651 to 1660. Capital burgesses, free tenants, freemen.

1660 to 1672. Capital burgesses, free tenants, residents.

1672. Capital burgesses, free tenants, conventional tenants.

1675 to 1678. Capital burgesses, free tenants, conventional tenants or residents.

1678. Capital burgesses, free tenants, conventional tenants, vel ~~residents~~ tenentes.

The line drawn through the word residents and the word tenentes are in a paler ink, and appear to have been written subsequent to the rest of the entry.

1679. Capital burgesses, free tenants, free burgesses.

From that period the lists continue in this latter form. By the parish registers and corporation records it appears that the persons whose names are contained in these lists, named residents, residents, sensores, freemen and conventional tenants, vel residents, were all inhabitants of the borough previous to 1676. At the court-leet held in *October*, 1676, the names of certain persons, not inhabitants of the borough, were added to the bottom of the resident list, with the words "admitted, Jurat. liber." affixed; such list being there styled the list of "conventional tenentes vel residents." No other mention whatever was made in the records of those non-resident persons than the mere entry of their names on the resident roll, although

they thenceforth exercised the rights and privileges of freemen or burgesses, together with the other resiants, by signing subsequent returns of members of parliament. In *May*, 1679, all the persons who were named in the last list of resiants are found in the same successive order in a list then styled "free burgesses," which stands in the said book in the place where the resiant list always previously stood; the name "free burgesses" being then given to the same persons instead of "resiants." Many persons, whose names appeared on the resiant list joined in the elections of mayors, and occasionally in those of members of parliament; no person ever joined in any such election till after his name had appeared in that list: and there does not appear to have been any other method of making free burgesses, except entering their names on the resiant list. The affidavits produced upon shewing cause against the rule stated, that so far back as living memory extended, the usage had been for the mayor and capital burgesses to meet together on particular days and elect free burgesses; that there was no tradition in the borough of any other method of making free burgesses; that the ancient books of the corporation did not contain any entries, except those above-mentioned, of any elections, either of free burgesses, or capital burgesses; and that from 1714 to the present time, the mayor and capital burgesses only had invariably elected the members of parliament for the borough.

*Adam and Coleridge* shewed cause. Before the Court can grant this application they must be satisfied that all the inhabitants of the borough of *West Looe*, upon being presented and sworn at the court-leet become by right, and are ipso facto members of the corporation. Now there are two conclusive answers to that proposition; first, that the inhabitants of a town cannot by law be in-

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corporated; and second, that the being presented and sworn at a court-leet cannot confer any right of admission to a corporate office. Without, however, relying on these, the affidavits do not support the rule, for they do not shew any existing usage in the borough by which the present applicant is entitled even to be presented and sworn at the court-leet. The charter of *Elizabeth* grants that the mayor and burgesses shall be a body corporate, but it nowhere incorporates the inhabitants; and even if it did, it could extend to those only who were inhabitants at the time it bore date. When the king incorporates the inhabitants of a town, he does not thereby confer upon every man who may thereafter come into the town the right of being a corporator; he appoints the original corporators by name, and if the body is to be perpetual, it must be perpetuated by some mode prescribed either in the charter or in a bye-law, which every corporation has a power of making, incident to their corporate character; *Bro. Abr. Corporation*, Pl. 65. If, indeed, this applicant had shewn an inchoate right to become a member of the corporation, the Court would have interfered to aid him, because wherever a party has an inchoate right, as by birth, or apprenticeship, or marriage, this Court will grant their writ of mandamus to enforce the completion of that right; *Rex v. the College of Physicians* (a): but he has shewn no such right. Neither does it appear upon these affidavits what connection there is between the court-leet and the corporation, nor how the admission at the one will affect the applicant's rights in the other. It will be contended in support of the rule that as some of the inhabitants whose names appeared upon the resident lists did in fact vote at elections, therefore, every inhabitant by having his name entered on that list acquired a right so to vote, and became to all intents and purposes

(a) 4 Burr. 2186.

a corporator. But the premises do not justify the conclusion, for unless it is satisfactorily shewn that all the inhabitants are corporators, and how they became so, the mere allegation that some of them did certain acts in the character of corporators carries no conviction with it: for though inhabitancy is one ingredient in the corporate character, there are others without which it is not complete. It is sworn, moreover, that the court-leet and court-baron are constantly held together, and which of those courts the persons named in the resiant lists attended, or for what purpose, or in what character they attended, is left wholly unexplained. It is, indeed, also sworn, and the point will doubtless be much relied on by the other side, that the corporation books contain no entries of any elections of free burgesses; but it is observable that they also contain no entries of any elections of capital burgesses, and as the latter must necessarily have taken place, the fact, taken altogether, becomes unimportant. With respect to usage, the whole argument is strongly in opposition to the rule, for the only usage at all clearly proved is that with respect to the elections of members of parliament, which it is distinctly sworn have, from the year 1714 down to the present time, invariably been made by the mayor and capital burgesses only.

*Copley, A. G. and Merewether, contra.* The real question in this case is, who were the burgesses by prescription in this borough. That there were burgesses by prescription there is no doubt, because they are mentioned in the charter of *Elizabeth*, though the mode of their creation is not there pointed out. It also appears by that charter, that former charters had incorporated the inhabitants, therefore the only question is who are, in the legal meaning of the word, the inhabitants of this borough.

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Now no man is an inhabitant, in the legal sense of the word, unles he is, *liber homo*, a freeman, that is, a householder who has taken the oaths of allegiance at the court-leet; for until he has been sworn at the court-leet, he is not *legalis homo*, and therefore not entitled to the name or privileges of an inhabitant. Then, when a man has been sworn at the court-leet and become *legalis homo*, and is also a householder, if the town in which he lives be an incorporation of the inhabitants, he being thus one of the inhabitants, becomes *ipso facto* one of the corporators also. Now it is quite clear that this borough is an incorporation of the inhabitants. The affidavits shew by very ancient usage, that the inhabitants were the persons from time to time incorporated, for they set out the lists extracted from the corporation books, which shew that from 1607 to 1624 the corporate body consisted of free tenants, residents and capital burgesses; and that from 1624 to 1678 residents, and residents only, though under various denominations, constituted one list of corporators, till in 1679, the term free burgesses was substituted for residents, and in that shape the lists have continued ever since. They shew further, that immediately upon their names being entered upon these lists, and their being thenceforth sworn, these persons received and exercised all the rights and privileges of free burgesses, taking part in elections both of mayors and members of parliament; that such entry and swearing was their only qualification; and that without that they were never allowed to act in any manner as free burgesses. Then this borough being an incorporation of inhabitants, and this applicant being an inhabitant householder, he is *de jure* a corporator, and has a right to call upon this Court to compel the proper officers to enrol and swear him as such, without which his title cannot *de facto* be complete. This is a question of immense public importance, affecting not

only the borough of *West Looe*, but almost every corporation in the kingdom; for the right claimed in this particular case will upon proper investigation be found to belong to the inhabitants of every corporate town. Then where the question before the Court involves matter of public right, the writ of mandamus is a writ of right, and may be so demanded. It is also the long established practice of the Court, where there are conflicting affidavits upon matters of fact, to make the rule absolute, and thus submit the evidence to the consideration of the only proper and constitutional tribunal, a jury; and where the law resulting from the facts, or from the documents, is attended with doubt or difficulty, they always adopt the same course, in order to give the applicant the opportunity of raising the question upon the record. On all these grounds it is confidently submitted that this applicant is entitled to have this rule made absolute. With respect to the usage relied upon by the other side, it is a perfect nullity, for part of that usage was for non-residents to vote at the election for members of parliament; and the late decision of the committee of the House of Commons on a case arising out of this very borough has declared that usage to be illegal.

ABBOTT, C. J.—I am of opinion that in the present case we ought not to grant the writ prayed for. We are desired to grant a writ of mandamus directed to the mayor and steward of the borough of *West Looe*, or other proper officer in that behalf, commanding them at the next court-leet to be holden for the borough to enrol and swear *Robert Reath* as a resiant or burgess of the borough. Now if it had appeared upon the affidavits before us, that a resiant, when enrolled and sworn as such, without reference to any other character, was entitled to the privilege of voting at the election of members of parlia-

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ment, I should have thought that we ought to grant the writ, because we are bound to give to every person the power of exercising that valuable franchise, if he shews us that he fills a character which entitles him to it. But it is conceded that a committee of the House of Commons, which is competent to give the law to this Court on this particular subject, has decided that the right of voting is in the members of the corporation, being also inhabitants of the town, and in such only. There is no reason therefore for granting a writ commanding that *Robert Reath* shall be enrolled *resiant*, and that brings me to the second, and indeed the only real question in this case, namely, whether upon these affidavits he has shewn any right to be enrolled a *burgess* of this borough. Now it has been contended, partly upon the language of the charters and partly upon the usage which appears to have prevailed in this borough, that every householder *resiant* has a right to have his name enrolled at the court-leet as a *resiant* and a member of the corporation. It is said that inhabitancy confers this right, though it is at the same time contended that the right is confined to householders. If inhabitancy does confer the right, why is it to be so confined? This charter is in language similar to many others. Whether it was wise or not to grant such charters, it is equally out of the range of our duty and our authority to enquire; our duty is to interpret them, and to interpret them according to the decisions of our predecessors, by whom we are to be guided. No instance has been laid before us of a corporation in which the mere character of inhabitant, or even of inhabitant householder, conferred the right to be a member of the corporation; nor do I believe that any such instance exists. An inchoate right to become a member of a corporation may be acquired by several well known means, as by birth, servitude, or marriage; and when

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such a right has been so acquired, this Court will interfere to see it perfected. But an inchoate right to become a member of a corporation, resting solely on the character of inhabitant, or inhabitant householder, is something perfectly new. This charter certainly confers no such right, and if we were to grant this writ, we should be establishing a precedent that might have consequences the extent of which it is impossible to foresee, and should be usurping an authority which the law has not vested in us, an authority to prescribe for the rule and government of a great portion of the corporations in the kingdom. Then, if the charter does not confer the right contended for, it remains only to see whether the usage does. The usage is certainly very obscure:—how much of it has proceeded from usurpation, how much from ignorance, and how much from concession, it is impossible upon these affidavits to say; but certainly the affidavits do not disclose any thing like an established usage for every resident householder to be enrolled and sworn a corporator. There appears to have been great ignorance and great neglect on the part of the corporation, both in keeping their books and in filling up their body; but it does appear that there are recorded instances of the election of members of the corporation; and it may be that the corporation when they come to be better informed of their situation, may think proper to exercise the power of election more regularly, which is incident to them as a body corporate, and which they must have, in order to keep the corporation alive and to give it perpetual succession, if no other mode is pointed out by the charter. There is, however, no usage shewn to have existed either before or after the charter of *Elizabeth*, nor does it appear that this was a corporation before that time, although it was a borough. The usage, such as it is, certainly does not warrant us

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in saying that every inhabitant householder has a right to be sworn a corporator; and we ought to find a very clear and cogent usage to that extent, before we interpose our authority for the purpose of giving to this corporation a character and constitution equally unknown to the law of the land and to our own practice and experience. Much of the argument that has been addressed to us might with more propriety have been applied to the question, whether or no resiancy confers a right of voting at the election of members of parliament, and that is a question which we have no authority to decide; upon that point we must take the law upon the decision of the House of Commons. I am, therefore, of opinion, that this rule ought to be discharged.


BAYLEY, J.—I agree that wherever there is fair doubt upon either matter of fact or matter of law, this writ ought to be granted; but it is also the duty of the Court to be satisfied that there is such doubt before they grant an application like the present, the effect of doing which would probably be to disturb almost every corporation in the kingdom. The form of this rule is very confused, and I am inclined to think that it is intentionally so. It is for a mandamus addressed to persons who fill different characters, and it leaves it in doubt in which of those characters it calls upon them to act. It appears from the charter that the mayor and steward of the borough are also officers of the court-leet, and whether this mandamus is meant to apply to them as officers of the court, or as officers of the corporation, the rule does not distinctly express. It therefore becomes necessary to consider the question as affecting them in each capacity. They are required to enquire and swear a person a resiant or burgess. Now will such a mandamus lie to them as officers of the court-

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leet? I think clearly not. The court-leet does not appear to be the place at which the business of the corporation is, or of necessity ought to be, transacted. It may, occasionally, for the convenience of all parties and by common arrangement, be transacted at the time and place of holding the court-leet, but the charter does not direct that any of the proceedings of the corporation shall be carried on there, nor does there seem to be any natural or necessary connexion between the one and the other. There are some of the corporation affairs which it would be impossible to transact at the court-leet. For instance, if a capital burgess dies, or is removed, another is to be elected within eight days whether there be a court-leet holden within that period or not, and other instances might be mentioned. If the present applicant wishes merely to be sworn at the court-leet, for any purposes connected with that court, he has only to attend there and demand the oath of allegiance to be administered to him, and his request will probably be at once complied with; but until he has attended and made that demand and been refused, we certainly cannot grant a mandamus on that ground. But it is said that this person has rights under the charter granted to the corporation, and that there is a connexion between those persons who are enrolled at the court-leet and those who are members of the corporation, and that, therefore, because he has a right to be enrolled at the court-leet, he has also a right to be sworn a member of the corporation. Then, if this mandamus is to be considered as addressed to the mayor and steward in their character of officers of the corporation, it becomes necessary to enquire whether he really has any such right, which will depend upon the language of the charter. Now, the charter of *Elizabeth* recites a petition from divers of the queen's subjects, inhabitants of the borough, that the inhabitants

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may be created a body politic and corporate. Whether that petition came from the whole or only from a part of the inhabitants, does not appear, nor is it material to enquire. The charter then proceeds to grant that the town of *Portbyan*, otherwise *West Looe*, shall be a free borough corporate, to consist of one mayor and burgesses, being inhabitants of the town. It does not, as was assumed in argument, state that *all* the inhabitants shall be burgesses; it provides for the election of the mayor and of twelve capital burgesses: but it says nothing as to common burgesses. What is the effect of that? Suppose the legal effect of this charter to have been, to make every inhabitant of the place in the first instance a member of the corporation, (which, however, I take not to have been its legal effect,) still that would not make all persons who thereafter might become inhabitants of the place, members of the corporation also. I take the law in that respect to be perfectly clear, that a man does not become a member of a corporation merely by residing within a borough; but that every corporation has an incidental right to keep itself alive, and that where no mode is pointed out by the charter for that purpose, it may make regulations of its own, and may lawfully fill up the vacancies in its own body by the means of election of new members. For these reasons it appears to me that this applicant has not made out a *primâ facie* case, and has failed to shew any such reasonable doubt either as to the facts or the law of the case, as would justify us in granting this writ. The rolls containing the lists of persons who have from time to time attended the court-leet, have been relied upon in support of this rule, but I have no difficulty in saying that in my opinion those lists have no sort of connexion with corporation purposes; and the probability is that they existed long before the date of the charter, and that they were made exclu-

sively for the purposes of the court-leet. Then it is suggested, that in this view of the case, the corporation will be at liberty to elect residents or non-residents at their own pleasure, which will be contrary to the decision of the House of Commons upon that subject; but I apprehend they will have no such power, for the charter, containing the words "*burgesses being inhabitants,*" seems clearly to impose the qualification of inhabitancy. For these reasons it appears to me that it is our duty to discharge this rule.

HOLROYD, J.—I was not present during the whole of the discussion of this case, and therefore I shall not go into argument upon it; but, so far as I have heard the case, I am of the same opinion with the rest of the Court.

LITLEDALE, J.—I am of the same opinion.

Rule discharged.

The KING *v.* SAUNDERS and others.

**INDICTMENT** at common law against the defendant for a conspiracy to obtain goods by means of false pretences, with counts on the statute of 30 *Geo.* 2. c. 24. for obtaining goods under false pretences. The indictment having been found by the grand jury for the county of *Middlesex*, a rule nisi was obtained on a former day for removing the indictment by certiorari into this court.

*Andrews* now shewed cause against the rule, and con-

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Thursday,  
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The stat. 30  
G. 2. c. 24. s.  
20, takes away  
the writ of  
certiorari, but  
where counts  
on that statute  
were joined  
with counts  
for a conspi-  
racy at com-  
mon law to  
obtain goods  
by false pre-  
tences:—  
Held that the  
certiorari was  
not taken  
away.

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tended, that as the indictment contained counts on the 30 G. 2. c. 24. it could not be removed into this court, for by sect. 20 of that statute it is declared, that no certiorari shall be granted to remove any indictment, conviction or other proceeding had thereon in pursuance of this act (a).

*Chitty, contra.* The 20th section of the statute in question does not come into operation where there are counts at common law joined with counts on the statute. If it were, it would always be in the power of prosecutors to deprive a defendant of the benefit of a certiorari in the most important cases, by introducing a count on the statute, upon which they might not intend to offer any evidence. In the crown office there is a memorandum of a case decidedly in point on this question; *Rex v. Vaux* and others. On the hearing of a summons before Lord *Mansfield*, C.J. in 1782, for a procedendo to remit an indictment to the sessions, which had been removed by the defendants into this Court, that learned judge held, that where part of the indictment was laid on the statute 30 Geo. 2. c. 24. and the rest at common law, the certiorari was not taken away, and therefore he refused the procedendo.

ABBOTT, C. J.—I am also of opinion that where there are counts at common law mixed up with counts on the statute, the certiorari is not taken away; and it is very reasonable that this should be so. Here is an indictment containing a great many counts for a conspiracy at common law, and there are one or two perhaps introduced on the statute for obtaining goods under false pretences. In all cases of this kind, it might be very easy to introduce counts on the statute for the very purpose of depriving a

(a) See *Rex v. Smith*, Cowp. 24. and *Rex v. Young*, 2 T. R. 472.

defendant of the benefit of the certiorari, if this construction were put upon the statute, which I think ought not to receive the sanction of the court.

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Rule absolute for a certiorari.

The KING v. WILSON, and others.

Thursday,  
February 10th.

ON a former day a rule was obtained calling on the churchwardens of the parish of ——— in the county of Cambridge, to shew cause why a mandamus should not issue to them commanding them to *make a rate* for the repairs of a donative church in that parish.

Mandamus  
will not lie to  
churchwardens to *make*  
a rate.

*Scarlett* now shewed cause and objected, preliminarily, that a mandamus would not lie to the churchwardens to *make a rate*. All that they could be required to do was, to call a meeting of the parishioners for the purpose of considering the propriety of making a rate. The churchwardens had not power to make a rate without the sanction of the vestry. He cited *Rex v. the Bishop of Chester* (a) and *Rex v. St. Margaret* (b).

*Denman*, C. S. contra, admitted the force of the objection.

PER CURIAM. You cannot call upon the churchwardens to make a rate. You can only call upon them to hold a vestry meeting for that purpose.

Rule discharged.

(a) 1 T. R. 396.

(b) 4 M. and S. 250. See 5 T. R. 364.



## Exparte GROCOT.

Thursday,  
February 10th.

Habeas corpus refused, to discharge an apprentice from a king's ship, where the apprentice did not allege that he was detained against his own consent. The master, however, may have a warrant to the commander of the vessel to have the apprentice discharged.

**WIGHTMAN** moved for a writ of habeas corpus to the commander of His Majesty's ship *Britannia* to bring up the body of *John Grocot*, an apprentice, detained on board the said ship for the purpose of serving in the navy. The application was made at the instance of the master. [*Abbott, C. J.*—Does the apprentice say that he is detained against his consent?] There is no affidavit to that effect.

**ABBOTT, C. J.**—Then non liquet the apprentice may not have voluntarily entered himself as a seaman, and may not wish to come back again. We never grant a habeas corpus where the party does not say that he is detained against his own consent. You must apply to a judge at chambers for a warrant at the instance of the master, and have the lad discharged in that way.

PER CURIAM.

Writ refused.

Wednesday,  
February 9th.

The 5th sect. of the malicious trespass act, 1 G. 4. c. 56. gives an appeal to the sessions, on condition that the party shall give "immediate notice of

The KING v. The Justices of HUNTINGDONSHIRE.

**ON** shewing cause against a rule nisi for a mandamus to the justices of *Huntingdonshire*, commanding them to enter continuances and hear an appeal at the next general quarter sessions against a conviction on the malicious trespass act, 1 Geo. 4. c. 56., the facts disclosed on affidavits were to the following effect:—On the 11th September the appellant was convicted by one justice, of a malicious trespass, and of the matters thereof," &c.—Held, that a notice of appeal seven days after a conviction on this statute, was insufficient to give the sessions jurisdiction.

malicious trespass to land, and adjudged to pay one penny for the damages and ten shillings costs. On the 14th the appellant applied verbally by his attorney for a copy of the conviction, but it was refused by the justice. On the 18th he made a written application to the same effect, but it was not granted, and on that day he paid the money under the assurance of the magistrate that it would not prejudice the merits of the case if he chose to appeal, and he then for the first time served the justice with notice of appeal, and entered into the recognizances required by the statute for prosecuting his appeal at the sessions with effect. The sessions dismissed the appeal on the ground that the damages and costs having been paid the appellant was concluded.

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DONSHIRE.

*Scarlett* and *Dover* now shewed cause, and in answer to the application relied upon the fact appearing upon the affidavits, that no notice of appeal had been given until seven days after the conviction, which they contended was too late, the 5th section requiring that the notice should be given *immediately*: upon this point they rested, without referring to any others.

*Patteson*, contrà, insisted that this being a penal statute ought to be construed liberally in favour of the subject. If the word "immediate" were to be construed strictly, it might mean the very moment the justice decided the case, or before the party quitted the justice room; but this could not be the intention of the legislature. An ignorant man, upon being convicted on this statute, might not be aware, until long after the conviction took place, that he had a right of appeal; but was he to be concluded, because on the instant he did not give a notice, (which must be in writing,) stating the matters of the appeal? Although the justices could not assess damages

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DONSHIRE,

beyond £5, yet it might happen that the party would not have money enough about him, and was he to forfeit his right of appeal because he could not raise it time enough to enable him to avoid going to prison? The statute surely ought not to receive so narrow a construction.

ABBOTT, C. J.—The right of appeal is given by the 5th section of this statute, on condition of the party's "giving *immediate* notice of such appeal and of the matters thereof, and finding sufficient security, to the satisfaction of such justice, for prosecuting the said appeal with effect, and abiding the determination of the Court therein." It is not necessary in this case to decide whether the words "immediate notice" are to be construed so strictly as to require that the notice should be given before the party quits the justice's room upon the determination of the complaint. But they must mean prompt and expeditious notice,—and a notice with reference to the *merits* of the case. I am far from thinking that that which took place in the seven days interval between the judgment of the justice and the giving notice entitles this party to much favour. It shews the importance of requiring that the notice of appeal should be given early; for it is manifest that his wanting a copy of the conviction was for the purpose of enabling him, with the aid of his attorney, to pick holes and find out faults in mere matters of form. Everybody knows that convictions are not drawn up on the instant. Drawing up the conviction is done afterwards and cannot be expected to be done immediately. I think the justices at sessions ought to have dismissed this appeal for want of due notice. They, it seems, have dismissed it on another ground; nevertheless, we ought not to send it down to be reheard, if we are of opinion, as we certainly are, that this party was in no condition to appeal, although their decision was not on that point. I am clearly of

opinion that this rule ought to be discharged. It is much to be lamented that for the sake of ten shillings, a party should go on at so great an expense of litigation, for whatever might be the result, it must be considerable to himself even if he succeeded.

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HOLROYD, J. and LITTLEDALE, J. concurred (a).

Rule discharged.

(a) *Bayley*, J. was absent.

The KING v. The Mayor and Corporation of FOWEY.

Friday,  
February 11th.

CARTER moved for an attachment against the defendants for not making a return to a peremptory mandamus. By the exigency of the writ they were required to make a return within six days, which they had not done. The mandamus had been served on the town clerk, but not personally on the defendants, and there was a doubt in the crown office whether an attachment would lie without personal service of the mandamus. Now in the case of a sheriff there is no personal service of the body rule to found a proceeding by attachment. The sheriff is a public officer, and the defendants stand in the same situation. In principle therefore there is no reason why the attachment should not lie in this case without personal service.

Attachment ordered against the mayor of a corporation for not making a return to a peremptory mandamus within the time prescribed by the writ, though there was no personal service thereof.

LITTLEDALE, J. (b)—It seems reasonable that an attachment should go. If the defendants wanted farther time to make their return, they ought to have applied to the Court for that purpose. Let the attachment go.

Rule granted.

(b) The only Judge in Court.

END OF HILARY TERM.



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By the 26 G. 2. c. 31. s. 4, no ale license shall be granted but on the 1st *September* yearly, or within 20 days after, and by s. 16. alehouses in cities and towns corporate are excepted; but by 3 G. 4. s. 77. s. 7. all general annual meetings for granting licenses, as well in cities and towns corporate as in all other places in *England*, shall be held in the month of *September*, yearly: Held, that the effect of this clause was not to repeal the general pro-

vision of the former statute, but to extend its operation to cities and towns corporate only. *Rex v. The Justices of Surry*, 5 G. 4. Page 435.

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**CHURCHWARDENS.**

and by s. 5. all powers given by the previous statutes upon the same subject are incorporated, except those altered by that statute. The 31 G. 2. c. 29. ss. 36 and 37., respectively take away the writ of certiorari, and give an appeal to the sessions: Held, that 50 G. 3. c. 73. s. 5. incorporates those sections, and that on a conviction under the latter statute, the certiorari is taken away, and an appeal given. *Rex v. The Mayor of Liverpool*, 4 G. 4. Page 4

2. Certiorari refused to move an indictment for murder from *Yorkshire*, in order to a trial at bar, or in another county, on the ground that the prisoners (who had pleaded to the indictment), could not have a fair and impartial trial in the former county. *Rex v. Mead*, 4 G. 4. 66
3. Certiorari does not lie to remove the appointment of a surveyor under the general highway act, 13 G. 3. c. 78. s. 80.; the remedy to the party aggrieved by the appointment, is by appeal to the quarter sessions. *Rex v. The Justices of St. Albans*, 5 and 6 G. 4. 521
4. The 30 G. 2. c. 24. s. 20. takes away the writ of certiorari, but where counts on that statute were joined with counts for a conspiracy at common law to obtain goods by false pretences: Held, that the certiorari was not taken away. *Rex v. Saunders*, 5 and 6 G. 4. 591

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**CHURCHWARDENS AND OVERSEERS.**

See **OVERSEERS**, 4.—**POOR**, 1.—**POOR RATE**, 2. 4.

1. In the parish of *B.*, consisting of

the township of B. and several hamlets, two churchwardens were appointed by the township, and two by the rest of the parish, who made separate rates for their own divisions respectively: Held, that the acting churchwardens for the township might maintain assumpsit against their predecessors for a balance remaining in their hands, without joining the other churchwardens as plaintiffs or defendants, and without proving that their appointment was strictly legal. *Astle v. Thomas*, 4 G. 4. Page 129

2. Where a parish certificate was granted by two persons who described themselves on the face of it to be, "the *only* churchwarden and the *only* overseer of the poor of the parish": Held, after a lapse of 63 years, in the absence of evidence to the contrary, that the court would intend, first, that the parish had by custom but one churchwarden; and second, that there had been originally two overseers, but that one had died, and consequently that the certificate was valid, as having been granted by a majority of the existing body of overseers, within the meaning of the certificate act, 8 and 9 W. 3. c. 30. *Rex v. The inhabitants of Catesby*, 5 G. 4. 278
3. Where a parish is incorporated with others for the maintenance of its poor, and a guardian is appointed, under the 22 G. 3. c. 83.; the churchwardens and overseers may still bind out poor children apprentices, and the indentures need not be signed by the guardian. *Rex v. The inhabitants of Lutterworth*, 5 G. 4. 449
4. Where a parish certificate, 35 years old, was granted by two persons, who described themselves on the face of it to be "the major part of the churchwarden and overseer," and there was evidence, on one side, that both before and ever since the

certificate was granted, but one overseer had acted in the parish, and on the other, that in two instances, at least, two overseers had been appointed, though only one had acted: Held, that the sessions might reasonably intend, as a question of fact, that there had never been more than one overseer appointed, and consequently that the certificate was valid. *Rex v. The inhabitants of Earl Shilton*, 5 and 6 G. 4. Page 525

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1. The costs to be paid by offenders under the stage coach act, 50 G. 3. c. 48. must be ascertained by the conviction, or it is bad. *Rex v. Payne*, 4 and 5 G. 4. 169
2. A conviction on the 5 Ann, c. 14. s. 2. against a common carrier, for having, in that capacity, game in his possession, need not negative the defendant's qualification to kill game; neither is it necessary to aver that he has the game in his possession "knowingly." *Rex v. Marsh*, 5 G. 4. 182
3. Where a magistrate committed a party to prison for an alleged offence against one statute, and afterwards drew up a conviction for a different offence from that stated in the commitment: Held, that the convic-



tion was no justification of the magistrate in an action against him for false imprisonment. Held, also, that the 43 G. 3. c. 141. s. 2. which deprives a plaintiff of his costs of suit against a magistrate, if the latter proves at the trial that the plaintiff was guilty of the offence imputed, only applies to cases where the conviction has been *quashed*, and, therefore, such evidence was inadmissible, it not appearing that the conviction had been quashed. *Sed quære*, whether admissible in mitigation of damages. *Rogers v. Jones*, 5 G. 4. Page 429

## CORONER.

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## COSTS.

See CONVICTION, 1. 3. — HABEAS CORPUS, 1. — MANDAMUS, 5. — ORDER OF REMOVAL, 2. — SESSIONS, 5.

1. Where to an indictment at the assizes for a misdemeanour, defendants consented to plead guilty, upon an understanding that they were not to be brought up for judgment; and no stipulation having been then made by the prosecutor for the payment of his costs: Held, that he was not afterwards entitled to a rule on the crown side to have his costs taxed. *Rex v. Rawson*, 4 and 5 G. 4. 180
2. Where a judge at the assizes refused to try an indictment for a misdemeanour, manifestly bad on the face of it, but did not order it to be quashed, and the prosecutor preferred another indictment for

## COURT BARON.

the same offence and removed it into K. B.; the Court would not call upon the prosecutor to pay the costs of the first prosecution before he proceeded with the second. *Rex v. Tremaine*, 5 G. 4. Page 478

## COUNSEL.

If the counsel for the defendant on the trial of an indictment for a misdemeanour opens new facts in his address to the jury, and afterwards declines calling witnesses to prove the facts so opened, the counsel for the prosecution is, notwithstanding, entitled to a general reply. *Rex v. Bignold*, 4 and 5 G. 4. 167

## COUNTY COURT.

The county clerk of *Middlesex* is entitled to take the following fees upon the hearing and determination of suits in his court, viz. upon the appearance of both parties upon the first summons and determination of the cause, 3s. 6d.; upon an order nisi in consequence of the non-appearance of the defendant upon the first summons, 2s.; and upon execution on a judgment against the defendant, 3s. 4d.; which sums include the fees to the county clerk, bailiffs and criers. *Rex v. The county clerk of Middlesex*, 5 G. 4. 229

## COURT BARON.

Trespass, for breaking and entering plaintiff's dwelling house, and seizing and carrying away his goods. Plea, a justification under a judgment recovered in a court baron, and a precept issued thereon. Replication, that there is not any memorandum of the proceedings, or of the said supposed judgment, remaining in the said court baron, in the said plea mentioned: Held, that the replication tendered an im-

material issue, and was therefore bad on general demurrer. *Dyson v. Wood*, 5 G. 4. Page 500

COURT-LEET.

See SETTLEMENT, 6.

CRIMINAL INFORMATION.

— See COUNTY COURT.—JUSTICES, 1.—ORDER OF REMOVAL, 1.

DEPUTY.

See JUSTICES, 5.

DISPENSATION.

See SETTLEMENT, 13, 14.

DISSOLUTION.

See SETTLEMENT, 13, 14.

DISTRESS.

See JUSTICES, 7.

DOWER.

Where a widow entitled to dower (which was unassigned) upon her husband's estate, which had been mortgaged by him for 1000 years, after receiving her dower upon one half-year's rent from the mortgagee in possession, became chargeable to the parish in which the property was situate, before she had resided forty days:—Held, that as the dower had not been assigned, she had not such an interest in the parish as to render her irremovable from what could be called *her own*. *Rex v. The Inhabitants of Northweald Bassett*, 5 G. 4. 221

DYING DECLARATIONS.

See EVIDENCE, 1.

ECCLESIASTICAL JURISDICTION.

See HABEAS CORPUS, 1.

ESTATE.

See DOWER.—LORD OF MANOR.—POOR RATE, 3.—SETTLEMENT, 10. 17.

EVIDENCE.

See CHURCHWARDENS AND OVERSEERS, 1. 4. — CONVICTION, 3. — COUNSEL.—HUNDRED, 2.—JUSTICES, 3. 7.—MANDAMUS, 1. 10.—POOR RATE, 4.—SESSIONS, 6.—SETTLEMENT, 11. 24.—SMUGGLERS, 3, 4.

1. It is a general rule in criminal cases that dying declarations are admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration; therefore, where a defendant had been convicted of perjury, and had obtained a rule nisi for a new trial, pending which he shot the prosecutor, and on shewing cause against the rule for a new trial, an affidavit of the dying declaration of the prosecutor, relating to the transaction out of which the prosecution for perjury arose, was proposed to be read:—Held, that it was inadmissible. *Rex v. Mead*, 4 and 5 G. 4. Page 176
2. Where a pauper hired a house under an unstamped written agreement:—Held, that the sessions might look at it to see whether it related to the premises in question, in order to determine upon the admissibility of parol evidence upon the same subject, with a view to raise the presumption of a contract which would confer a settlement. *Rex v. The Inhabitants of Bathwick*, 5 G. 4. 331

3. An order of sessions, upon an appeal between two parishes respecting the settlement of pauper *A.*, is not admissible upon the trial of an appeal touching the settlement of pauper *B.*, his sister, on a suggestion that the point at issue was precisely the same in both appeals. *Rex v. The Inhabitants of Knaptoft*, 5 G. 4. Page 319

### EXAMINATION OF PAUPER.

See ORDER OF REMOVAL, 1.—SESSIONS, 2.

### EXCEPTIVE HIRING.

See SETTLEMENT, 1, 2. 8.

### EXTORTION.

See COUNTY COURT.—JUSTICES, 2.

### FEEES.

See COUNTY COURT.—JUSTICES, 2.—LORD OF MANOR.

### FINAL JUDGMENT.

See INDICTMENT, 3.

### FINES.

See LORD OF MANOR.

### FIRE INSURANCE.

See HUNDRED, 1.

### FRAUD.

See SETTLEMENT, 5. 20.

### GAME.

See CONVICTION, 2.—INFORMATION.—MANDAMUS, 2.

### GUARDIAN.

See CHURCHWARDENS AND OVERSEERS, 3.

## HAWKERS AND PEDLARS.

### HABEAS CORPUS.

See SMUGGLERS, 4.

1. The statute 53 G. 3. c. 127. substitutes the writ de contumacè capi-endo for the old writ of de excommunicato capi-endo, and directs that the former shall be considered in the same way, and be open to the same objections as the latter. Therefore, where a defendant was committed by an ecclesiastical judge of appeal for contumacy in not paying costs, and the significavit only described the suit to be "a certain cause of appeal and complaint of nility," without shewing that the defendant was committed for a cause within the jurisdiction of the spiritual judge:—Held, that the defendant was entitled to be discharged on habeas corpus. *Rex v. Dugger*, 4 G. 4. Page 113
2. Habeas corpus refused to discharge an apprentice from a king's ship, where the apprentice did not allege that he was detained against his own consent. The master, however, may have a warrant to the commander of the vessel, to have the apprentice discharged. *Ex parte Grocot*, 5 and 6 G. 4. 594

## HAWKERS AND PEDLARS.

1. The manufacturer of goods cannot, without a license, vend his wares in any other than the places enumerated in 50 G. 3. c. 41. s. 23.; and a manufacturer hawking his goods in a different place, without any license so to do, may be convicted in a 10*l.* penalty only, under s. 17. of the act, although s. 20. imposes a 40*l.* penalty for an offence apparently of the same description. *Rex v. Websdell*, 4 G. 4. 44
2. Exposing to sale and selling *tes* as a hawker, without a license, is an offence against, 50 G. 3. c. 41. and subjects the offender to a penalty of

## HUNDRED.

10*l.* although by 12 *G.* 3. c. 46. s. 6. it would be an offence for a hawker to sell tea in an *unentered place*, even if he had a hawker's license.

*Rex v. M'Gill*, 4 *G.* 4. Page 82

8. The agent or servant of an unlicensed hawker is equally liable with his principal to a penalty, if he sells without a hawker's license.  
*Id.* *Ibid.*

## HIGHWAYS.

See INDICTMENT, 2.

## HIRING AND SERVICE.

See SETTLEMENT, 11, 12, 13, 14. 22.  
26.

## HUNDRED.

See MANDAMUS, 5.—PETTY SESSIONS,  
1.

1. The owner of stacks of corn maliciously set on fire may maintain an action against the Hundred, on the 9 *G.* 1. c. 22. although he has previously received the full amount of his loss from an insurance office.  
*Clark v. Blything Hundred*, 4 *G.* 4. 132
2. To support an action upon the 9 *G.* 1. c. 22. s. 8. against the Hundred for the wilful and malicious destruction of stacks of corn by fire, it is sufficient to give such evidence as may reasonably induce the jury to believe that the fire was malicious. Where a declaration upon this act alleged the notice of the fire to have been given to the *parish*, instead of the *town, village, or hamlet*, as required by the statute:—Held, that the objection was cured by verdict. *Reed v. Gainsbury Hundred*, 5 *G.* 4. 198
3. An action will not lie against the Hundred upon the 9 *G.* 1. c. 22.

## INCLOSURE ACT. 605

for the unlawful and malicious destruction of a plantation of trees by fire, unless the act done proceeds from a malicious motive towards the owner of the property. Therefore, where a fire, supposed to have been wilfully made, had commenced in another person's plantation at the distance of a mile from the plaintiff's wood, and by communication the flames destroyed his property:—Held, that the case did not come within the Black Act, so as to entitle him to sue the Hundred. *Curtis v. Godley Hundred*, 5 *G.* 4. Page 419

## IMPRISONMENT.

See SETTLEMENT, 13.

## INCLOSURE ACT.

1. Where a clause in a private inclosure act gave an appeal to any person aggrieved by any thing done in pursuance of that act, "except as to such acts, determinations, or proceedings of the commissioners, as by the general inclosure act were directed to be final and conclusive;" and an order was made by a commissioner and a magistrate jointly, for stopping up a private road set out under the local act:—Held, that an appeal lay to the sessions against such order, there being nothing in the general inclosure act which rendered the decision of justices final and conclusive. *Rex v. The Justices of Yorkshire*, 4 *G.* 4. 10
2. A private inclosure act containing a clause, enacting "that no item or charge in the accounts of the commissioners should be binding to the parties or valid in law, unless the same should have been duly allowed by a justice of peace for the county," in the manner therein mentioned, does not deprive a party aggrieved

of the right to appeal given in another clause, against "any thing, done in pursuance of that or the general inclosure act, (other than and except such determinations as were by that or the general inclosure act declared to be binding, final and conclusive,) the allowance by a single justice being a ministerial act not falling within the exception. *Rex v. The Justices of Cumberland*. 4 G. 4. Page 61

3. By the general inclosure act, 41 G. 3. c. 109. s. 10., commissioners are empowered to set out private roads, which, when set out, are to be made and afterwards kept in repair at the expense of the owners and proprietors of the lands inclosed:—Held, that commissioners who had made private roads under the authority of that and a private inclosure act, (which said nothing about private roads,) had no power to make a rate for reimbursing themselves the expense incurred. *Lord Falmouth v. Richardson*, 5 and 6 G. 4. 532

### INDICTMENT.

See COSTS. — PLEADING, 2, 3, 4. — RIGHT OF WAY.

1. Indictment for not repairing a bridge, described as situate within the parishes of *P.* and *M.*, and averring that the inhabitants of *P.* and the inhabitants of the township of *M.* were liable to repair, without going on to state what part of the bridge was situate within the township of *M.*, and that the inhabitants thereof were liable to repair, is erroneous. *Rex v. The Inhabitants of Penegoes*, 4 G. 4. 94
2. A parish is liable, as of common right, to repair all highways therein, but an indictment will not lie against a district called an extra-parochial hamlet, for not repairing

### INFORMATION.

a public highway within the same, unless some special ground of liability to repair is alleged. *Rex v. The Inhabitants of Kingmore*, 4 G. 4. Page 96

3. Indictment, that defendant in the reign of the present king kept a common gaming-house. Plea, that defendant in the reign of the present king was acquitted upon an indictment for keeping a common gaming-house in the reign of the late king, against the peace of our said lord the king; and averring the identity of the offences. Demurrer, concluding with a prayer of judgment of respondeas ouster:—Held, first, that the plea was bad, because the indictment upon which the acquittal was founded charged an offence committed in the reign of the late king, and defendant could not by averment shew that the offence charged in both indictments was the same; and second, that the judgment on demurrer was final, although the demurrer concluded with a prayer of judgment of respondeas ouster. *Scemle*, that every indictment for a misdemeanour must conclude contra pacem, &c. *Rex v. Taylor*, 5 G. 4. 487

### INFANT.

See SETTLEMENT, 26, 27.

An infant can do no act to bind himself, except such as is clearly for his own benefit; therefore, though he may bind himself an apprentice, he cannot dissolve the indenture. *Rex v. The Inhabitants of Great Wigston*, 5 G. 4. 445

### INFORMATION.

A qui tam information for penalties under the game laws is not an in-

formation within the meaning of the 48 G. 3. c. 58., so as to entitle the plaintiff to enter an appearance and plea, when the defendant himself neglects to appear and plead. *Davies, qui tam, v. Bint*, 5 G. 4.

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## JURIES.

See COURT-BARON.

1. After a tales panel, on an indictment for libel, (appointed to be tried by a special jury,) had been quashed for unindifferency in the sheriff:—Held, that a venire facias juratores might be awarded to the coroners, though two of the special jurors summoned had attended on the former occasion. *Rex v. Dolby*, 4 G. 4. 71
2. Upon the prayer and award of a tales de circumstantibus at nisi prius, it is not compulsory on the coroner or sheriff to select the talesmen from among the bystanders accidentally in court; they may be selected out of persons previously appointed by the coroner or sheriff to be in attendance, in the expectation that a tales would become necessary. *Id.* ib.

## JURISDICTION.

See PETTY SESSIONS, 1, 2.—SESSIONS, 7. 9.—SETTLEMENT, 25.

## JUSTICES.

See ALHOUSES.—CARRIER.—CONVICTION, 1, 2, 3.—DOWER.—EVIDENCE, 2.—INCLOSURE ACT, 1, 2.—MANDAMUS, 1. 3. 5, 6, 7. 10.—ORDER OF REMOVAL, 1.—OVERSEERS, 1. 3, 4.—PETTY SESSIONS, 1, 2.—POOR, 1.—PRISONERS, 1.—SESSIONS, 1, 2, 3, 4, 5, 6, 7. 9.—SETTLEMENT 13. 20. 25.—SMUGGLERS.

1. The Court refused an information

against a justice of the peace, for alleged misconduct in his office, where it appeared that the supposed criminal acts took place more than a year before the application, although the prosecutor swore that the circumstances did not come to his knowledge until just before the motion. *Rex v. Bishop*, 4 G. 4.

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2. Where the mayor of an ancient borough, in which he was also a justice of the peace, took a fee of 4s. from a publican resident within the borough, for renewing his annual license, and though it appeared that for fifty-seven years a similar fee had been uniformly received by the mayor for the time being, from every publican residing within the borough applying to have his license:—Held, that such fee was illegal, and might be recovered back in assumpsit for money had and received, without notice of action. *Morgan v. Palmer*, 5 G. 4. 282
3. Where magistrates first took the examination of witnesses, not on oath, in support of a conviction, and afterwards swore them to the truth of their evidence, the Court expressed its disapprobation of the practice. *Rex v. Kiddy*, 5 G. 4. 364
4. After issue joined, and notice of trial given in an action against a magistrate for an act done in his magisterial capacity, he may withdraw his plea, pay money into court, and plead de novo. *Nestor v. Newcome*, 5 G. 4. 399
5. A charter provided that there should be two aldermen in the borough of D., who should act for one year by themselves, or their deputies; that on their death or removal other aldermen should be elected, who should act for the rest of the year by themselves, or their deputies; that in the absence of the aldermen new

aldermen might be elected in their room; and that the aldermen for the time being should be justices of the peace for the borough:—Held, that the deputy of an alderman was not a justice of the peace for the borough. *Jones v. Williams*, 5 and 6 G. 4. Page 537

6. *Semble*, that since the 27 H. 8. c. 24. s. 2., the King cannot delegate the power of making a justice of the peace. *Id.* *ib.*

7. The 11 G. 2. c. 19. s. 16., which gives a summary remedy to landlords whose tenants have deserted their premises with rent in arrear, and no sufficient distress, by requesting two justices, on their own view, to deliver possession, does not require the request or complaint to be made upon oath. Therefore, where in trespass against two magistrates, for turning a tenant out of possession under this act, a record of the proceedings, drawn up conformably to the statute, was given in evidence:—Held, that it was a complete defence to the action, though they did not appear to have acted on the oath of the landlord. *Basten v. Carew*, 5 and 6 G. 4. 563

### LANDLORD AND TENANT.

See JUSTICES, 7.—POOR RATE, 5.

### LICENSE.

See ALBOUSES.—HAWKERS AND PEDLARS.—JUSTICES, 2.—MANDAMUS, 3. 7.

### LORD OF MANOR.

See MANDAMUS, 2.—POOR RATE, 1.

Tenants in coparcenery of a copyhold estate are in law but one heir; and it seems that they are entitled

### MANDAMUS.

to admittance upon the payment of one fine to the lord and one set of fees to the steward of the manor. *Rex v. The Lord of the Manor of Bonsall*, 5 G. 4. Page 414

### MANDAMUS.

See ALBOUSES.—ATTACHMENT.—INCLOSURE ACT, 1.—JUSTICES, 3.—LORD OF MANOR.—OVERSEERS, 1.—PETTY SESSIONS, 2.

1. Where justices omitted to set out on the record of a conviction on the Building Act, the evidence adduced on the hearing of the information, as nearly as possible in the words used by each of the witnesses, in pursuance of the 3 G. 4. c. 23., a mandamus issued to compel them to do so. *In Re Rix*, 5 G. 4. 249

2. Where a person, claiming as heir at law of the tenant last seised of a copyhold, was refused admission by the lord, and a mandamus issued, but the lord, in his return thereto, did not deny the heirship, except argumentatively, the Court ordered a peremptory mandamus. *Rex v. The Brewers' Company*, 5 G. 4. 307

3. Mandamus refused to command justices to hear an application for an alehouse license, which they had refused, though it was suggested that their refusal proceeded from a mistaken view of their jurisdiction. *Rex v. The Justices of Farringdon*, 5 G. 4. 365

4. Mandamus does not lie to the mayor and aldermen of a borough, requiring them to assemble for the purpose of considering the propriety of removing non-resident members of their body, no serious injury or inconvenience to the inhabitants being suggested as resulting from such non-residence. *Rex v. The Mayor of Portsmouth*, 5 G. 4. 390

5. Where the inhabitants of a town,



not within a *hundred*, had incurred costs in defending actions brought on 57 G. 3. c. 19. s. 38., for damages done by riotous assemblies :—Held, that mandamus would not lie to two justices of the town to make and levy a rate for paying the costs.

*Rex v. The Justices of King's Lynn*, 5 G. 4. Page 402.

6. A resident inhabitant of a town corporate has a right to inspect and take copies of a bye-law of the corporation, pending an action against him for a breach of the same, although he is not a corporator ; and mandamus will lie for this purpose.

*Harrison v. Williams*, 5 G. 4. 408

7. Mandamus will not lie to justices to rehear an application for an ale license at any other period of the year than within the first twenty days of *September*, though the justices may have refused a license under a mistake of law. *Rex v. The Justices of Surry*, 5 G. 4. 435

8. Mandamus refused to compel a corporation to meet for the purpose of considering the propriety of removing non-resident members, where the charter in terms required residence. *Rex v. The Mayor of Totness*, 5 and 6 G. 4. 507

9. Mandamus granted to the steward of a manor to allow inspection of the court-rolls to two tenants litigating a right of common in the manor, although the cause was not at issue. *Rogers v. Jones*, 5 and 6 G. 4. 510

10. Mandamus lies to justices to amend the record of a game conviction, by setting out the evidence on which it is founded, as nearly as possible in the words used by the witnesses. *Rex v. Warnford*, 5 and 6 G. 4. 511

11. Where the charter of a corporation declared that " it shall be lawful for the mayor and capital bur-

gesses to remove any of their body for non-residence within the borough :"—Held, that this gave them a discretionary and not a compulsory power of amotion. *Rex v. The Mayor of West Looe*, 5 and 6 G. 4.

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12. An inhabitant of a borough is not, by force of his inhabitancy, entitled to be a corporator ; therefore, where the inhabitant of a borough applied for a mandamus to be enrolled and sworn a corporator, but did not shew an inchoate right in the inhabitants to be corporators, the Court refused the writ. *Id.* 578

13. Mandamus will not lie to churchwardens to make a rate. *Rex v. Wilson*, 5 and 6 G. 4. 593

## MANOR.

See LORD OF MANOR.—MANDAMUS, 2. 9.—SETTLEMENT, 6.

## MARKET.

See POOR RATE, 1.

## MARRIAGE.

See SETTLEMENT, 5.

## MURDER.

See CERTIORARI, 2.

## NOTICE OF ACTION.

See JUSTICES, 2.—OVERSEERS, 5.

## NOTICE OF APPEAL.

See OVERSEERS, 2.—SESSIONS, 3, 4, 5. 7. 9.

## NOTICE OF TRIAL.

See JUSTICES, 4.—SESSIONS, 1.



## OFFICE.

See SETTLEMENT, 6.

## ORDER OF REMOVAL.

See SESSIONS, 2.

1. *Semble*, it is not essential to the validity of an order of removal that the pauper should be examined, but if it is possible, the justices are bound to examine him; and if they corruptly omit to summon him for that purpose, they are liable to an information, or to an action at the suit of the pauper, if he is removed illegally. *Rex v. The Inhabitants of Tavistock*, 4 G. 4. Page 113
2. A suspended order of removal must be served within a reasonable time. Therefore, where an order of removal was made and suspended on the same day, on account of the age and infirmity of the pauper; and she survived three years, but no notice of the order of removal was served on the parish to which she was ordered to be removed, till after her death:—Held, that the service was not within a reasonable time, and that the order of removal was void. *Rex v. The Inhabitants of Lampeter*, 5 G. 4. 437

## OVERSEERS.

See CHURCHWARDENS AND OVERSEERS,  
2. 3.—POOR RATE, 4.—SESSIONS,  
3, 4.—SETTLEMENT, 20. 25.

1. Where ex-overseers of the poor delivered to succeeding overseers a certificated balance sheet of the gross sums received and disbursed during the year in which they were in office, without any other voucher or document:—Held, that this was not a sufficient compliance with the 17 G. 2. c. 38., and mandamus is-

sued to the justices to hear and determine a complaint for not properly accounting pursuant to the statute. *Rex v. The Justices of Worcestershire*, 4 G. 4. Page 7

2. A notice of appeal against the allowance of overseers' accounts, that the different items thereof, (enumerating them,) would be objected to, without specifying the particular causes or grounds of appeal, pursuant to 41 G. 3. c. 23. s. 4., is insufficient. *Rex v. Mayall*, 4 G. 4. 88
3. Where a local act of parliament, passed for regulating the affairs of the parish of W., declared affirmatively that there should be two overseers nominated and appointed to succeed those who were in office at the time of passing the act:—Held, that the justices might still appoint four overseers, under the authority of 43 Eliz. c. 2. *Rex v. Pinney*, 4 G. 4. 123
4. It is the bounden duty of overseers to endeavour to find employment, either in or out of their own parish, for able-bodied poor persons thrown out of their usual work; and it seems that it is only in the event of such employment not being to be found, that they are authorized in giving pecuniary relief. *Rex v. Collett*, 4 G. 4. 135
5. A formal demand is necessary before an action can be maintained against overseers for the surplus arising from a distress for poor's rates, under 27 G. 2. c. 20. s. 2; and a plea of tender, which is found not to cover the plaintiff's demand, will not cure the objection. *Simpson v. Routh*, 5 G. 4. 193
6. An overseer supplying coals to the poor of his parish in the name of another person, but without any view to his own profit, is not liable to the penalties of 55 G. 3. c. 137. s. 6. *Skinner v. Buckee*, 5 G. 4. 360

7. A rated inhabitant of a parish cannot sue an overseer for the penalty given by 17 G. 3. c. 3. s. 2. for refusing an inspection of the rate books, unless he shews that he has been *injured* by the refusal. *Spencely v. Robinson*, 5 and 6 G. 4. Page 551
8. The demand of an inspection under this statute must be made at a reasonable time and place; therefore, where the demand was made at a parishioner's own house at 8 o'clock in the evening, and not at the house of the overseer:—Held, that the overseer incurred no penalty by refusing, *Id.* ib.
9. A parishioner is entitled by the same statute to have, on demand, a copy of the rate *forthwith* delivered to him, upon paying 6d. for every twenty-four names:—Held, that the overseer is entitled to a reasonable time, *Id.* ib.

### PAYING MONEY INTO COURT.

See JUSTICES, 4.

### PEERAGE.

See PLEADING, 3.

### PENALTIES.

See CARRIER.—HAWKERS AND PEDLARS. — INFORMATION. — OVERSEERS, 6, 7, 8, 9.—SMUGGLERS, 4.

### PETTY SESSIONS.

1. The 3 G. 4. c. 33. s. 2. gives a summary remedy to the extent of 30l. against the hundred for injuries done to property by riotous assemblies, on application to the petty sessions in the manner therein prescribed; and by s. 7. an appeal lies to the quarter sessions

when persons are aggrieved by any thing done in pursuance of the act. Where the petty sessions, under a mistake of the law, and not upon the merits of the case, dismissed an application under this statute:—Held, that the quarter sessions might entertain an appeal against their determination. *Rex v. Tucker*, 5 G. 4. Page 479

2. Service of a rule nisi for a mandamus to the sessions to hear an appeal against the determination of the petty sessions need not be upon the clerk of the peace; it is sufficient if it be served on the justices whose decision is complained against, *Id.* ib.

### PLEADING.

See CERTIORARI, 4.—CHURCHWARDENS AND OVERSEERS, 1.—CONVICTION, 1, 2.—COSTS, 1, 2.—COURT BARON.—HABEAS CORPUS, 1.—HUNDRED, 1, 2.—INDICTMENT.—INFORMATION.—JUSTICES, 2. 4.—OVERSEERS, 5.—RIGHT OF WAY, 1, 2.—SMUGGLERS, 1, 2, 3.

1. An informal plea in abatement cannot be quashed on motion, though pleaded for delay; it must be demurred to. *Rex v. Cooke*, 4 and 5 G. 4. 174
2. The court will not allow a defective plea in abatement to an indictment for a misdemeanour, when once pleaded, to be amended. *Id.* 354
3. Plea of peerage by way of abatement to an indictment for a misdemeanour:—Held, ill on demurrer, for not shewing in what manner defendant derived his title, and that he was a peer of the united kingdom, *Id.* ib.
4. If a continuance be entered from the last day of *Trinity* to the first day of *Michaelmas* term, facts oc-

curing in the interim cannot be pleaded puis darrein continuance after the first day of *Michaelmas* term, without the leave of the court. *Rex v. Taylor*, 5 and 6 G. 4.

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### POOR.

See CHURCHWARDENS AND OVERSEERS, 3.—OVERSEERS, 4. 6.—POOR RATE, 4. 5.—PRISONERS.

*Quære*, Whether able-bodied persons thrown out of their ordinary employment, and in consequence thereof unable to maintain themselves and families, are entitled to parochial relief in money, as impotent poor, within the meaning of 43 Eliz. c. 2. s. 1. *Rex v. Collett*, 4 G. 4. 135

### POOR RATE.

See CHURCHWARDENS AND OVERSEERS, 1.—OVERSEERS, 4. 5.—POOR.—SESSIONS, 5.

1. By the *Manchester and Salford Paving and Lighting Act*, 32 G. 3., the tenants and occupiers of all messuages, houses, &c., and other tenements within the same towns, are liable to be rated. The lord of the manor of *Manchester*, being owner of the market in that town, is not liable, under this act, to be rated in respect of his occupation thereof, and the tolls arising therefrom, as the occupier of a tenement. *Rex v. Mosley*, 4 G. 4. 91

2. A poor rate, without giving a specification of the property for which the party is rated, is bad: therefore, where under the head "Occupiers," the names only of the parties rated were given, with the rates and assessments opposite their names respectively:—Held, insuffi-

### PRACTICE.

cient. *Rex v. The Aire and Calder Navigation*, 5 G. 4. Page 341

3. Where by a local act the guardians of the poor of the town of *Kingston-upon-Hull* were authorized to levy rates "by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriation of tithes, and all stocks and estates in the said town, in equal proportions according to their respective worths and values:—Held, that under this act all personal property, including shipping, was rateable, whether the owners were or were not resident within the town. *Rex v. The Hull Dock Company*, 5 G. 4. 464

4. If the ground of appeal against a poor rate be, that certain rateable property has been altogether omitted, the onus does not lie upon the appellant to give the sessions the means of amending the rate, it being the duty of the parish officers to include all rateable property in the rate, and take what means they can to ascertain its value, *Id. ib.*

5. A landlord cannot be rated to the poor in respect of houses let to tenants, who have been excused their rates on account of poverty, *Id. ib.*

6. A rate upon the *Hull Dock Company* to the full amount of their profits, without regard to the amount of poor rates, is bad, *Id. ib.*

### PRACTICE.

See ATTACHMENT.—CERTIORARI, 4.—CHURCHWARDENS AND OVERSEERS, 1, 2.—CONVICTION, 1, 2.—COSTS.—COUNSEL.—COURT-BARON.—EVIDENCE, 2, 3.—INDICTMENT, 3.—INFORMATION.—JUSTICES, 2, 3, 4.—HUNDRED, 2.—MANDAMUS, 3.—ORDER OF REMOVAL.—PLEADING.—POOR RATE, 2.—SESSIONS.

PREROGATIVE.

See JUSTICES, 6.

PRISONERS.

At common law, prisoners committed to gaol for trial, and having no means of supporting themselves in the mean time, are not entitled to any maintenance at the public expense. The 19 Car. 2. c. 4., and 31 G. 3. c. 46., require the justices to provide a stock of materials for the employment of such prisoners, and the 4 G. 3. c. 64., authorizes the justices to set such prisoners to work, "with their own consent," in order to maintain themselves. Where a visiting justice reported to the sessions, as an abuse, that untried prisoners had been set to work on a machine called the treadmill, contrary to their own inclinations, and the sessions thereupon ordered, that such mode of employment should be applied to other prisoners, as well as those sentenced to hard labour; and that those committed for trial, who were able to work, and had the means of employment offered them, by which they might earn their support, but who refused to work, should be allowed bread and water only:—Held, that mandamus would not lie to compel the justices to order such prisoners any other food; and that in ordering even an allowance of bread and water, they had done more than they were by law bound to do. *Rex v. The Justices of Yorkshire*, 4 G. 4. Page 155

PRISON DISCIPLINE.

See PRISONERS.

PUIS DARREIN CONTINU-  
ANCE.

See PLEADING, 4.

RATE.

See CHURCHWARDENS AND OVERSEERS, 1.—INCLOSURE ACT, 3.—MANDAMUS, 5. 13.—OVERSEERS, 4, 5, 7, 8, 9.—POOR.—POOR RATE.—SESSIONS, 5.

REMOVEABILITY.

See DOWER, 1.—SETTLEMENT, 17, 19, 20.

RENTING A TENEMENT.

See SESSIONS, 6.—SETTLEMENT, 7, 10, 19, 21, 23.

*Quære*, Whether any thing but an express contract for the hire of a house for a whole year will satisfy the requisites of the statute 59 G. 3. c. 50. *Rex v. The Inhabitants of Bathwick*, 5 G. 4. Page 331

RETURN.

See ATTACHMENT.—MANDAMUS, 2.

RIGHT OF WAY.

1. A right of way for all the King's subjects to pass and repass with their carts and carriages is not restrained because *all* carriages cannot pass and repass. *Rex v. Lyon*, 5 and 6 G. 4. 513
2. Where a way has been recognised as public in an act of parliament for making streets, squares, &c., it is not necessary that it should be adopted by the parish to make it a public way, *Id.* *ib.*

SECONDARY EVIDENCE.

See EVIDENCE, 2

## SERVANT.

See HAWKERS AND PEDLARS, 3.—  
SETTLEMENT, 7. 9. 11, 12, 13, 14.  
18. 22. 26.

## SESSIONS.

See CERTIORARI, 3.—CHURCHWAR-  
DENS AND OVERSEERS, 4.—EVI-  
DENCE, 2, 3.—ORDER OF REMOVAL.  
—OVERSEERS, 1, 2, 3, 4.—PETTY  
SESSIONS.—POOR.—POOR RATE, 4.  
—PRISONERS.—SETTLEMENT, 24.

1. Where an appeal was entered at the *Easter*, and respited until the *Midsummer* sessions, and on the 24th *June* a copy of the order of respite was served on the respondents, without any notice of trial, and the respondents appeared at the following sessions, in *July*:—Held, that the sessions were bound to hear the appeal, though no other notice of trying the appeal had been given than the service of the order of respite. *Rex v. The Inhabitants of Lambeth*, 4 G. 4.

Page 26

2. Where the sessions, on appeal, quashed an order of removal on the ground of its appearing that the pauper had not been *adduced and examined* before the removing justices, touching his settlement, and it not being stated that the pauper had not been *summoned* before the removing justices:—This Court quashed the order of Sessions, and directed a re-hearing of the appeal. *Rex v. The Inhabitants of Tavistock*, 4 G. 4. 113

3. A notice of appeal against overseers' accounts, stating that the appellant "will object to the following items, or charge of payments, in the said accounts; that is to say," and then setting out the items objected to, without specifying the particular causes or grounds

of appeal, pursuant to 41 G. 3. c. 23. s. 4., is insufficient. *Rex v. Sheard*, 5 G. 4. Page 261

4. Where the attornies on both sides signed an admission the day before the sessions, respecting items in the overseers' accounts, objected to by the appellant:—Held, that it was not a waiver of due notice of appeal, not having been signified by the respondents, or their attorney "in open Court," as required by s. 5. of the same statute. *Id.*
5. Where an appeal against a poor rate was entered at the *Midsummer* sessions, and respited until the *Michaelmas* sessions, and then further respited, at the instance of the appellant, till the *Epiphany* sessions, four days previously to which, the respondents gave notice that they would not oppose the appeal, and the appeal was accordingly allowed without opposition:—Held, that the appellant was entitled to costs as upon an appeal which had been "heard and determined" within the meaning of the 17 G. 2. c. 38. s. 4. *Rex v. The Inhabitants of Causton*, 4 G. 4. 269
6. *Quære*: Whether the justices at sessions are at liberty to inquire into the real value of a tenement, where there has been a *bonâ fide* hiring, and actual payment of a £10 rent, under the statute. *Rex v. The Inhabitants of Ampthill*, 5 G. 4. 297
7. The sessions have no jurisdiction to receive an appeal in a matter of bastardy, until the requisites of 49 G. 3. c. 68. ss. 5. & 7. have been complied with, as to the notice of appeal, and entering into a recognizance. Notice of appeal for an adjourned session for a different division of a county does not

satisfy the requisites of that statute. *Rex v. The Justices of Lincolnshire*, 5 G. 4. Page 454

8. A rule of practice at sessions will not control the express words of an act of parliament. *Id.* *ib.*
9. The 5th sect. of the malicious trespass act, 1 G. 4. c. 56., gives an appeal to the sessions, on condition that the party shall give "immediate notice of such appeal, and of the matters thereof," &c:—Held, that a notice of appeal seven days after a conviction on this statute was insufficient to give the sessions jurisdiction. *Rex v. The Justices of Huntingdonshire*, 5 & 6 G. 4. 594

## SETTLEMENT.

See CHURCHWARDENS AND OVERSEERS, 2.—EVIDENCE, 2.

1. Where the owner of a colliery, by indenture, hired certain workmen, to be employed in the colliery for one whole year, at the wages of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a day additional, when that time was exceeded; and they were to forfeit 10s. 6d. for every act of disobedience, and 2s. 6d. a day for lying idle, (to be deducted out of their wages,) with a proviso, that the jurisdiction of the justices should not be ousted in case of disputes; and a covenant that if at Christmas the master should have occasion to repair the machinery belonging to the colliery, he might stop the works at the furthest for a fortnight, without paying any wages to the workmen, unless otherwise employed:—Held, that this was a conditional, and not an exceptive contract, and that a workman who had served under it for one whole year, did not thereby gain a settlement. *Rex v. The Inhabitants of Byker*, 4 G. 4. Page 13

2. The owner of a colliery, by agreement, hired his workmen for a whole year, but they were not to be required to work during ten days in the Christmas holidays; during the working days they were to receive 2s. 6d. per day wages, and if they neglected to work on any one day, they were each to forfeit the penalty of 1s.; they were not required to work the whole day, but to do such quantity of work as was equal to a full day's work, and as soon as that was accomplished, they were to be at liberty to go where they pleased; and, though there was a reservation of the jurisdiction of the justices, in case of any disputes:—Held, that this was an exceptive contract, and that a workman who had served under it for one whole year, did not thereby gain a settlement. *Rex v. The Inhabitants of Gateshead*, MSS. E. 1821. 17
3. Where a parish apprentice was bound by two justices, and the order was referred to in the indentures, but not by the date thereof:—Held, that the indentures were void by 56 G. 3. c. 139. ss. 1. & 5., and conferred no settlement by service under them. *Rex v. The Inhabitants of Bamburg*, 4 G. 4. 23
4. The 35 G. 3. c. 101. s. 4. does not prevent a person from acquiring a settlement by paying public parochial taxes, in respect of a tenement above the yearly value of £10, although such a person has not a right to vote in the election of the parish officers. *Rex v. The Inhabitants of St. Martin's*, 4 G. 4. 23

her maiden name, and after the lapse of several years was married, by banns, to a second husband in that name, with the description of "widow:"—Held, that in the absence of fraud, such marriage was legal, and that her settlement followed that of the second husband. *Rex v. The Inhabitants of St. Faith's*, 4 G. 4. Page 34

6. Where the Court-leet of the manor of *A.* appointed a person to be street-driver of the borough of *R.*, a district within the manor, extending into seven parishes, in one of which he afterwards became chargeable as a pauper, and it appearing, first, that it was not an annual office; second, that he took no oath of office; and third, that he had not served under the appointment for one whole year:—Held, that he had not such a public annual office or charge as would gain him a settlement, under 3 W. & M. c. 11. s. 36. *Rex v. The Inhabitants of Yalding*, 4 G. 4. 39

7. Where a pauper was hired for a year as a shepherd, and was to have a house and garden, rent free, 7s. a week, and the going of thirty sheep with his master's flock, as wages, the feed of the sheep alone being worth £16. a year, and he lived for two years with his master under the agreement:—Held, first, that as it did not appear to have been part of the bargain, that the sheep were to be fed with growing produce; and second, that as the pauper by residing in his master's cottage as a servant, did not "come to settle," he did not acquire a settlement by renting a tenement within the meaning of 13 & 14 Car. 2. c. 12. *Rex v. The Inhabitants of Bardwell*, 4 G. 4. 53

8. A labourer in husbandry hired himself from Michaelmas to Mi-

chaelmas, at weekly wages, and by the terms of the contract, he was to have a month in harvest to himself, and if he and his master could not agree for the harvest month, he was to harvest where he pleased. At the commencement of the harvest he agreed with his master to work on the terms then offered, and continued in the service during the whole year:—Held, that this was an exceptive and not a conditional hiring, and, therefore, no settlement was gained by service under it. *Rex v. The Inhabitants of Althorne*, 4 G. 4. Page 59

9. Where the owner of a mansion-house and gardens, agreed with the pauper to take care of the gardens, and for his so doing he was to take the issues and profits of part thereof, and to live in a cottage contiguous thereto, belonging to his master, and he was to continue in the premises for a year, unless some other person, before that time, should occupy the mansion, in which case the gardens were to be delivered up; and the pauper continued in the occupation of the gardens, on these terms, for more than a year, the produce being worth to him £70 per annum:—Held, that the pauper, being only a servant, and the residence not being his own, did not come to settle within the meaning of 13 & 14 Car. 2. c. 12. *Rex v. The Inhabitants of Shipdam*, 4 G. 4. 89

10. Vendor contracted, in writing, with vendee, for the sale of a messuage, with immediate possession, at the price of £310., to be paid in two instalments, the first on 30th November, and the second on 24th June following, when the vendor was to make out a good title, and execute a conveyance, but in case



of non-payment of the money on that day, the agreement to be void. Vendee having paid the first instalment was let into and remained in possession for more than a year and a half afterwards, but never paid the last instalment, nor had any conveyance executed. An action was brought by vendor for the remainder of the purchase money, but discontinued upon vendee giving up the contract, and receiving back part of the first instalment:—Held, first, that by this contract, the vendee did not gain a settlement under 9 G. 1. c. 7. s. 5. by the purchase of an equitable estate; and second, that he had not such a possessory right, during the interval, from 30th *November* to 24th *June*, as to gain him a settlement, by renting a tenement of £10 value, under 13 & 14 *Car. 2. c. 12.* *Rex v. The Inhabitants of Geddington*, 4 G. 4. Page 101

11. Where a nephew hired himself to his uncle for three years, at 1s. per day, when he had work for him to do, and when he had not work for him, he was not to be paid, but was to be at liberty to get work from other people, and there was no proof of a service for the whole of any one year:—Held, that no settlement was gained as a yearly hired servant. *Rex v. The Inhabitants of Polesworth*, 5 G. 4. 202

12. Where a pauper was hired for three years, at £20 a year, in capacity of looker; his master telling him at the time the contract was entered into, that he did not think he should have full employment for him: and he served him for three years, during which time he did other work for his master, who paid him for it extra, by the job, and he also worked for another master as looker, when his leisure

suited;—Held, that the relation of master and servant did not subsist between the parties, so as to confer a settlement on the pauper. *Rex v. The Inhabitants of Lydd*, 5 G. 4.

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13. Where a servant, under a yearly hiring, served for eleven months and two days, and was then committed to, and imprisoned in, the the house of correction for one month, under 20 G. 2. c. 19. for misbehaviour, at the instance of the master:—Held, that the commitment and imprisonment were no dissolution of the contract, or such an interruption of the service as to prevent a settlement, although the servant received no wages for the time he was in custody. *Rex v. The Inhabitants of Hallow*, 5 G. 4.

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14. A mistress hired a servant from *Shrove Tuesday* until *old Michaelmas day* following, and three weeks before the latter day, asked her to “stay again,” to which the servant replied that she had no objection, if they could agree about wages. They agreed for £3. 10s., and 1s. earnest was paid, but nothing was then said as to the time the service was to continue. A fortnight before *old Michaelmas* the mistress said to her, “I have hired you, but mentioned no time; remember, you are hired for fifty-one weeks;” to which the servant replied, “very well.” The servant lived with her mistress for a year, under this agreement. She had three days’ holidays at *Christmas*, and four other days at different times afterwards, and at the end of the year received her wages:—Held, that this was a yearly hiring and service to confer a settlement. *Rex v. The Inhabitants of Market Bosworth*, 5 G. 4. 217



15. Where an apprentice served his master for six years and nine months in the parish of *I.*, under indentures which expired at *Midsummer* day, and then went into the parish of *D.*, and hired himself for a month to another master at weekly wages, to which service the first master gave his consent; and at the end of that month the pauper entered into a fresh agreement with the second master at the like wages, and continued to serve under that agreement until the 7th *June*, when he was called out to serve in the local militia, which he did for a fortnight, and returned to his second master on the 21st *June*, and made a new agreement to serve him as before at 6*d.* a day, and while in that service he slept from the 21st to the 24th *June*, inclusive, in the parish of *I.*: Held, that whether the service with the second master during the remainder of the term was with the consent of the first or not, still the pauper's sleeping for the last three nights in *I.* settled him in that parish, though the first master did not know of his sleeping there. *Rex v. The Inhabitants of Iddesleigh*, 5 *G.* 4. Page 245
16. A bastard child, born in an extra-parochial place, does not acquire its mother's settlement. *Rex v. The Inhabitants of St. Nicholas*, 5 *G.* 4. 253
17. Where a pauper contracted in writing for the purchase of two cottages and gardens at the price of 70*l.*, and paid 10*l.* on account, at the date of the agreement, but never afterwards paid the remainder of the purchase money: Held, that he had not such an equitable estate as to render him irremovable from the parish in which the property was situated. *Rex v. The Inhabitants of Woolpit*, 5 *G.* 4. 273
18. Where by a parol contract the master agreed to teach the pauper the trade of a shoemaker for twelve months, for which the master was to receive a guinea, the pauper's father finding him board and lodging during the time; and at the expiration of the year, the pauper entered into a fresh agreement to work with his master for twelve months, making shoes at 3*d.* per pair the first half year, and at 4*d.* per pair the remaining half year, and at the end of six months he quit-  
ted the service altogether:—Held, that there was not a connected hiring and service, so as to confer a settlement. *Rex v. The Inhabitants of St. Mary*, 5 *G.* 4. Page 291
19. Merely renting a tenement of 10*l.* a year, without actual payment will not prevent the removal of the tenant under the 35 *G.* 3. c. 101., if he is actually chargeable. *Rex v. The Inhabitants of Amp-hill*, 5 *G.* 4. 291
20. If a pauper, who has the means of paying his rent and sustaining himself and his family by the sale of his goods, applies to the parish for relief, and the overseers, without fraud on their part, are compelled by an order of justices to relieve him; he is actually chargeable, and removable, if he has not acquired a settlement, *Id.* *ib.*
21. The bona fide renting a tenement at 10*l.* a year, and paying the rent after a pauper has become chargeable, will not confer a settlement under 59 *G.* 3. c. 50, *Id.* *ib.*
22. Where a pauper hired himself and served for a year in the parish of *A.*, and just before the expiration of that year he hired himself again for a second year, and after serving six months under that hiring, he went with his master into the parish of *B.*, and there served

out the remainder of his second year, sleeping there the last forty nights:—Held, that he did not acquire a settlement by hiring and service in the latter parish under the 3 and 4 *W. & M.* c. 11. *Rex v. The Inhabitants of Apethorpe*, 5 G. 4. Page 313

23. A yearly hired servant in husbandry had, by agreement, a house and garden, a rood of potatoe ground, and the keep of a cow on his master's land. The keep of the cow was instead of so much wages. The cow having failed in milk, the master in place thereof kept two heifers for him on his land, through kindness and not in consequence of any bargain. The potatoe land, and the keep of the two heifers being together above the value of 10*l.*:—Held, that this was renting a tenement so as to confer a settlement, after a sufficient residence. *Rex v. The Inhabitants of Bennimorth*, 5 G. 4. 319

24. Where, in the absence of the usual proof in support of a settlement by apprenticeship, it appeared that the pauper, when a boy, had lived for three years with his master and then ran away; that twenty years since a fire had happened in the apartment in which the pauper's father lived, and destroyed every thing he had; that the father and mother of the pauper were both dead; that the pauper's master and the wife of the latter were also dead; that the master had left no property at his decease, and that no relatives of his were to be found; that a fellow-apprentice of the pauper had seen in his master's hand an indenture, which he understood to be the indenture of apprenticeship of the pauper; and that after the pauper had left his master's service he married, and the parish in which he was supposed to have

served as an apprentice, relieved his wife by receiving her into the workhouse: Held, that this was sufficient evidence to warrant the sessions in presuming a legal binding and service as an apprentice, so as to confer a settlement. *Rex v. The Inhabitants of St. Mary-le-bone*, 5 G. 4. Page 325

25. Where, pursuant to an order of county justices, overseers of a county parish, bound one of their paupers apprentice to a master residing in a borough within the same county, having justices with exclusive jurisdiction therein, and gave no notice of such binding to the overseers of the borough parish:—Held, that the indentures were void by 56 G. 3. c. 139., and that a service under them gained the pauper no settlement. *Rex v. The Inhabitants of Newark*, 5 G. 4. 366

26. Where a pauper ten years old went to service "for meat and clothes as long as he had a mind to stop, to do what he could, and what he was bid," and remained two years:—Held, that this was not a yearly hiring, and that a settlement was not acquired by service under it. *Rex v. The Churchwardens of Christ's, York*, 5 G. 4. 442

27. Where an infant bound himself apprentice for seven years, and after serving three years quarrelled with his master, paid him 6*d.* for the remainder of his time, and then left him and bound himself to another master in another parish:—Held, that the apprentice had no power to dissolve the first apprenticeship, and that the second, therefore, was invalid, and conferred no settlement. *Rex v. The Inhabitants of Great Wigston*, 5 G. 4. 445

## SHERIFF.

See JURIES, 1, 2.

## SMUGGLERS.

1. A conviction on 24 G. 3. c. 47. s. 1. which subjects vessels having foreign spirits on board to forfeiture, when found hovering, &c. within the limits of a port of this kingdom, must shew on the face of it, that the party convicted is a *British* subject, and that the vessel was not proceeding on her voyage, wind and weather permitting, &c. *Ex parte Hawkins*, 4 G. 4. Page 1.
2. A conviction under 45 G. 3. c. 121. s. 7. for carrying and conveying foreign brandy in half ankers, alleged to be "*then and there liable to forfeiture*, the said offence being committed against the provisions of the acts for the prevention of smuggling," is insufficient, in not shewing the particular grounds of forfeiture. *Ex parte Smith*, 4 G. 4. 126.
3. A conviction under 11 G. 1. c. 30. s. 16., for knowingly harbouring and concealing smuggled spirits, cannot be supported by evidence of finding the smuggled spirits concealed in the house of the party convicted, unless he was present at the time of finding, or some other direct proof be given of a guilty knowledge. *Ex parte Ransley*, 4 G. 4. 151.
4. The 3 G. 4. c. 110. makes it an offence for any person to be found carrying and conveying, &c. uncustomed brandy, and "upon the oath of one or more credible witness or witnesses," the offender is liable to be sent on board a king's ship, if he is fit and able to serve in the navy, and if not, to pay a pecuniary penalty. Where a conviction stated that *R. A.* was duly convicted before the justice of having been found "carrying and conveying" brandy liable to seizure, without stating that he had been convicted of that offence upon the credible witness:—Held, the conviction was bad, and the offender was discharged. *Ex parte Smith*, 4 and 5 G. 4.

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— c. — Alehouses.*Henry 8.*22. c. 12. Poor.  
27. c. 24. Breach of the Peace.  
— c. — Justices of the Peace.  
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35. c. 6. Juries.*Edward 6.*1. c. 3. Poor.  
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2. c. 5. Poor.

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